(38)

No. 91-194-CSX
Status: GRANTED

Title: Quill Corporation, Petitioner
v.
North Dakota by and through its Tax Commissioner, Heidi Heitkamp

Docketed:
August 2, 1991

Court: Supreme Court of North Dakota

Counsel for petitioner: Gaggini,John E.

Counsel for respondent: Spaeth,Nicholas J.

40 copies ea pet & appd

Entry	Date	Note	Proceedings and Orders
1	Aug 2 1991	G	Petition for writ of certiorari filed.
2	Aug 2 1991		Appendix of petitioner filed.
4	Sep 3 1991	X	Brief amici curiae of Connecticut, et al. filed.
5	Sep 3 1991	X	Brief amicus curiae of Direct Marketing Association filed.
8	Sep 3 1991	X	Brief of respondent North Dakota in opposition filed.
9	Sep 3 1991	X	Brief amicus curiae of City of New York filed.
3	Sep 4 1991		DISTRIBUTED. September 30, 1991
6	Sep 4 1991	X	Brief amici curiae of National Assn. of Retail Druggists, et al. filed.
7	Sep 4 1991	X	Brief amici curiae of Natl. Conference of State Legislatures, et al. filed.
10	Oct 7 1991		Petition GRANTED. limited to Question 1 presented by the petition. The case is set for oral argument in tandem with No. 90-119, Wisconsin Department of Revenue v. William Wrigley, Jr., Co.
			**********
12	Nov 4 1991		Record filed.
		*	Original record District Court of Burleigh County, NorthDakota (1 Box)
11	Nov 5 1991		Record filed.
		*	Original record Supreme Court of North Dakota (1 box)
13	Nov 20 1991		SET FOR ARGUMENT WEDNESDAY, JANUARY 22, 1992. (4TH CASE)
21	Nov 20 1991		Brief amicus curiae of Tax Executives Institute, Inc. filed.
14	Nov 21 1991		Brief amicus curiae of New Hampshire, Delaware and Maine filed.
15	Nov 21 1991		Brief amici curiae of Carrot Top Industries, et al. filed.
16	Nov 21 1991		Brief amicus curiae of Clarendon Foundation filed.
17	Nov 21 1991		Brief amici curiae of Arizona Mail Order Co., et al. filed.
18	Nov 21 1991		Brief amicus curiae of American Bankers Association filed.
19	Nov 21 1991		Brief amicus curiae of Direct Marketing Association filed.
20	Nov 21 1991		Brief amicus curiae of Coalition for Small Direct Marketers filed.
22	Nov 21 1991		Brief amici curiae of National Association of Manufacturers, et al. filed.
23	Nov 21 1991		Joint appendix filed.
24	Nov 21 1991		Brief of petitioner Quill Corp. filed.
25	Nov 21 1991		Brief amici curiae of American Council for the Blind, et al. filed.
26	Nov 21 1991		Brief amici curiae of New Hampshire, Delaware and Maine filed.

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No. 91-194-CSX

Entry	Date	Note	Proceedings and Orders
27	Nov 21 1991		Brief amici curiae of Magazine Publishers of America, Inc., et al. filed.
28	Nov 22 1991		LODGING received from Arizona Mail Order Co., Inc., et al., as amici curiae. 10 copies (Miscellaneous Enforcement Letters, etc.)
29	Nov 27 1991		CIRCULATED.
39	Dec 16 1991	X	Brief amicus curiae of Tax Policy Research Project filed.
33	Dec 20 1991	X	Brief amicus curiae of New Mexico filed.
30	Dec 26 1991		Lodging consisting of one box containing 6 folders received from amicus Multistate Tax Commission.
31	Dec 26 1991	X	Brief amicus curiae of City of New York filed.
32	Dec 26 1991	X	Brief amici curiae of International Council of Shopping Centers, et al. filed.
34	Dec 26 1991	X	Brief amicus curiae of Multistate Tax Commission filed.
35	Dec 26 1991	X	Brief amici curiae of Connecticut, et al. filed.
36	Dec 26 1991	X	Brief amici curiae of National Governors' Association, et al. filed.
37	Dec 26 1991	X	Brief amicus curiae of State of New Jersey filed.
38	Dec 26 1991	X	Brief of respondent North Dakota filed.
40	Jan 15 1992	X	Reply brief of petitioner Quill Corp. filed.
41	Jan 22 1992		Argued

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91-194

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

QUILL CORPORATION,

Petitioner,

v.

STATE OF NORTH DAKOTA,
by and through its Tax Commissioner,
HEIDI HEITKAMP,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of North Dakota

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the North Dakota Supreme Court is obligated to follow the longstanding precedent of *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), in a case that is factually indistinguishable from *Bellas Hess*?

Whether the North Dakota Supreme Court may give retroactive effect to its decision, which is contrary to established constitutional precedent, to make Quill liable for uncollected use taxes back to July 1, 1987?

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IN THE

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QUILL CORPORATION,

Petitioner,

v.

STATE OF NORTH DAKOTA,
by and through its Tax Commissioner,
HEIDI HEITKAMP,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of North Dakota

PETITION FOR WRIT OF CERTIORARI

Petitioner, Quill Corporation ("Quill"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of North Dakota entered on May 7, 1991. The North Dakota Supreme Court decided a constitutional question contrary to this Court's decision in *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967).

OPINIONS BELOW

The opinion of the Supreme Court of the State of North Dakota is reported at 470 N.W.2d 203 (1991), and is reprinted in the Appendix at A1-A36.

The Memorandum Opinion of Judge Graff of the District Court for the South Central Judicial District, County of

Burleigh, State of North Dakota, was issued on May 15, 1990 (N. Dakota State Tax Reporter (CCH) ¶ 200-376) and is reprinted in the Appendix at A38-A42.

JURISDICTION

This action was brought by the State of North Dakota ("North Dakota") against Quill for taxes alleged to be due under the North Dakota Use Tax Act, as amended (Sections 57-40.2-01(6) and (7), N.D. Cent. Code (Supp. 1989), and regulations promulgated thereunder (N.D. Admin. Code § 81-04.1-01-03.1 (1987)).

The Supreme Court of North Dakota entered its judgment on May 7, 1991. No rehearing was requested. This Petition is filed within 90 days of the North Dakota Supreme Court's judgment as allowed by 28 U.S.C. § 2101(c) and U.S. Supreme Court Rule 13.1.

The jurisdiction of this Court to review the judgment of the Supreme Court of the State of North Dakota is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional and statutory provisions:

U.S. Const. art. I, § 8, cl. 3
U.S. Const. art. VI, ¶¶ 2 and 3
U.S. Const. amend. XIV, § 1
N.D. Cent. Code §§ 57-40.2-01(6) and (7) (Supp. 1989)
N.D. Admin. Code § 81-04.1-01-03.1 (1987)

The text of these provisions and related sections of the North Dakota Sales and Use Tax Acts are reproduced in the Appendix at A46-A57.

STATEMENT OF THE CASE

This case involves North Dakota's challenge to this Court's decision in *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967). In derogation of that decision, North Dakota has required Quill to collect and remit North Dakota use taxes on sales made by mail and telephone to North Dakota customers, despite Quill's lack of any physical presence or activities in North Dakota. The court imposed this tax liability retroactively to July 1, 1987.

Quill's Business.

Quill, a national mail order concern selling office supplies, stationery and office equipment, is incorporated in Delaware and maintains its principal place of business in Lincolnshire, Illinois.[1] Quill's only offices and warehouses are located in Illinois, California and Georgia and Quill is authorized to transact business only in those states.

Quill solicits sales through catalogs and advertising flyers mailed to customers throughout the United States, including customers located in North Dakota. All catalogs and advertising flyers are designed, printed and mailed from locations outside North Dakota. Quill receives orders from customers by mail and telephone (including fax, telecopy, telex and electronic mail[2]) at its Illinois, California and Georgia locations. Quill ships merchandise to fill those orders by United States mail or common carrier from locations outside North Dakota.

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[1] Pursuant to Supreme Court Rule 29.1, the Court is advised that Quill is neither the parent nor the subsidiary of any other company.

[2] Electronic mail is a term to describe computer communication via telephone.

Quill does not own any real or personal tangible property whatsoever in North Dakota and does not maintain any office, distribution point, sales house, warehouse or other place of business in North Dakota. Quill does not have any agent, salesman, employee, representative, independent contractor, canvasser, solicitor or other person of any kind soliciting sales or otherwise acting on its behalf in North Dakota. Quill does not store inventory or merchandise in North Dakota and does not retain any security interest in merchandise sold to North Dakota customers. Quill does not have any telephone listing, toll-free telephone line, "800" number or WATS line in North Dakota. Quill does not have a bank account in North Dakota. Quill does not advertise by radio or television media in North Dakota, nor does it advertise in newspapers distributed in North Dakota or on billboards located in the state. Quill does not solicit by means of telegraphy, cable, optic, microwave, or similar communication system located in North Dakota.

The district court found that Quill's contacts with North Dakota were factually indistinguishable from the vendor's contacts with Illinois examined by this Court in *Bellas Hess*. App. A40.

The North Dakota Use Tax.

North Dakota levies a use tax upon the privilege of using in North Dakota "tangible personal property purchased at retail." N.D. Cent. Code § 57-40.2-02.1. The statute provides that the use tax is to be collected from the purchaser by any retailer "maintaining a place of business in this state" and is made the obligation of the retailer whether or not the tax is actually collected. N.D. Cent. Code § 57-40.2-07.

Prior to 1987, the terms "retailer" and "retailer maintaining a place of business in [North Dakota]" were applied in accordance with this Court's holding in *Bellas Hess*, requiring a "physical presence" in North Dakota such as an office, distribution house, sales house, warehouse, salesperson or agent. N.D. Cent. Code § 57-40.2-01(6) and (7) (prior to 1987 amendments).

In 1987, North Dakota enacted legislation to expand the term "maintaining a place of business" to include every person who engaged in the regular solicitation of sales of tangible personal property by the distribution of catalogs, periodicals, or advertising flyers by mail.[3] The effect of that legislation is to require mail order companies to collect North Dakota use tax even though their only contact with the state is through the U.S. mail, telephone and common carrier.[4]

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[3] Section 57-40.2-01(6), N.D. Cent. Code (Supp. 1989) as amended in 1987, defines "retailer" to include:

> [E]very person who engages in regular or systematic solicitation of a consumer market in this state by the distribution of catalogs, periodicals, advertising flyers, or other advertising, or by means of print, radio or television media, by mail, telegraphy, telephone, computer data base, cable, optic, microwave, or other communication system. App. A47.

The definition of "[r]etailer maintaining a place of business in this state" was also amended to include substantially the same activities as defined above. N.D. Cent. Code § 57-40.2-01(7) (Supp. 1989) App. A47-A48.

[4] The North Dakota legislature recognized that the 1987 amendments to the North Dakota Use Tax Law when enacted conflicted with this Court's decision in *Bellas Hess*. *See* North Dakota House Concurrent Resolution ("H. Con. Res.") No. 3083 (which urged Congress to enact federal legislation to allow the states to impose sales and use tax obligations on out-of-state mail order vendors) App. A58-A59. *See also* 1987 House Committee Minutes regarding H. Con. Res. 3083, where State Rep. Hoffner, who introduced H. Con. Res. 3083, urged support for the Resolution by stating:

(Footnote continued on following page)

North Dakota's Administrative Code § 81-04.1-01-03.1 defines the term "regular or systematic solicitation" as three or more separate transmittances of any advertisement during a specified twelve-month period. App. A56. Quill falls within the definitions of a "retailer" and a "retailer maintaining a place of business in the state" under the amended North Dakota law because Quill solicits sales from the consumer market through catalogs and advertising flyers distributed by mail more than three times during the year, and would be required to collect North Dakota use tax from its residents under North Dakota law if that law is constitutional.

Proceedings Below.

North Dakota filed this action on July 7, 1989, asking to have Quill declared a retailer maintaining a place of business in North Dakota and to recover from Quill North Dakota use taxes (plus interest and penalties) levied upon North Dakota customers' local use of goods commencing

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[4] *continued*

> The [North Dakota] house of representatives passed HB 1195 some weeks ago by a wide margin and that has a fiscal positive aspect on the state of about 14.1 million dollars. *The state can only realize that revenue if Congress passes this kind of [federal] legislation* (emphasis added). App. A60.

HB 1195 and SB 2555 amended N.D. Cent. Code § 57-40.2-01(6) and (7), which is the subject matter of this petition.

See also Testimony Before the House Finance and Taxation Committee (Jan. 13, 1987) where State Tax Commissioner M.K. Heidi Heitkamp stated:

> [T]his Bill [HB 1195] prepares the State for immediate implementation of any federal legislation. App. A66.

Federal legislation has been considered but has not yet been enacted by Congress. *See*, *infra*, p. 24, n.22.

July 1, 1987. Quill defended against North Dakota's action on the grounds that it violated the due process and commerce clauses of the U.S. Constitution as construed by this Court's decision in *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967). Quill also sought reimbursement of attorneys' fees and costs pursuant to 42 U.S.C. §§ 1983 and 1988.

On cross-motions for summary judgment, the district court held for Quill based upon this Court's ruling in *Bellas Hess*:

> It seems clear to the Court that the case of *Hess v. Illinois*, 386 U.S. 753 (1967) prohibits this type of legislation. In *Hess*, the facts are very similar to those found in this case. Hess was a mail order house with its principal place of business in Missouri. Its sales to Illinois residents were substantial. Hess' manner of doing business in Illinois was similar to that of Quill in this case. (App. A40.)

* * * * *

Quill solicits sales of merchandise through catalogs and advertising flyers mailed to customers throughout North Dakota from locations outside of North Dakota. Quill does *not* maintain any office, distribution house, sales house, warehouse or any other place of business in North Dakota; it does *not* have any agent, salesmen, or other type of representative to sell or take orders, to deliver merchandise, to accept payments or to service merchandise it sells here; it does *not* have any telephone listing or toll free telephone line, and does *not* advertise by any radio or television media in North Dakota; it does *not* advertise in any newspapers distributed in North Dakota, nor solicit business in any fashion other than by catalog or flyer. *All of the business conducted in North Dakota is*

> *done by United States mail, telephone or common carrier.*[5] (App. A39.) (emphasis added).

The district court rejected the state's arguments that the constitutional standards set forth in *Bellas Hess* were no longer applicable, characterizing the state's arguments as "merely restatements" of Justice Fortas' dissent in *Bellas Hess*. App. A40. The court declared that the 1987 amendments to North Dakota Use Tax Law, Sections 57-40.2-01(6) and (7), violated the due process and commerce clauses of the United States Constitution and declared those amendments invalid as applied to Quill. App. A42. Without analysis, the court denied Quill's request for reimbursement of attorneys' fees and costs pursuant to 42 U.S.C. §§ 1983 and 1988. App. A42.

The state appealed to the North Dakota Supreme Court which reversed.[6] The supreme court rejected the constitutional standards established in *Bellas Hess* and held that those principles were "obsolescent precedent" (App. A10) and no longer applicable to mail order sellers who did no more than communicate with customers by mail as part of a general interstate business. (*Quill*, App. A13, 25-26). The court, without any evidential support in the record, asserted:

> The economic, social, and commercial landscape upon which *Bellas Hess* was premised no longer exists,

[5] The district court rejected the state's argument that the QSL software programs (retail value $15 each) which were sold or transferred free of charge by Quill to six North Dakota customers constituted a sufficient basis to distinguish Quill from National Bellas Hess.

[6] Quill cross-appealed that portion of the final judgment whereby the district court dismissed Quill's counterclaim for reimbursement of attorneys' fees and other costs under 42 U.S.C. §§ 1983 and 1988.

> save perhaps in the fertile imaginations of attorneys representing mail order interests.

Quill, App. A11.

Although the North Dakota Supreme Court acknowledged that the 1987 amendments to the North Dakota statute were inconsistent with the " 'bright line' distinction between mail order sellers whose only connection with [their] customers in the taxing state was by common carrier or the United States mail and those with more significant connections [e.g., retail outlets, solicitors, or property] with the state," the court refused to follow the nexus test set forth in *Bellas Hess*. *Quill*, App. A6, *paraphrasing Bellas Hess*, 386 U.S. at 758. Instead, the court adopted the "economic benefits" test articulated by Justice Fortas (dissenting) in *Bellas Hess* as the appropriate standard to determine tax nexus and speculated that this Court would do the same. *Quill*, App. A13. The North Dakota Supreme Court held Quill liable for North Dakota use taxes on sales made by Quill into North Dakota commencing July 1, 1987. This petition followed.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD GRANT CERTIORARI TO CORRECT THE NORTH DAKOTA SUPREME COURT'S REFUSAL TO APPLY *BELLAS HESS* IN A CASE THAT IS FACTUALLY INDISTINGUISHABLE.

Bellas Hess.

This case directly presents the question whether this Court's decision in *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), is still valid precedent and applicable to a case that is factually indistinguishable.

The Supreme Court of North Dakota rested jurisdiction to tax Quill upon its determination that "the foundational basis of *Bellas Hess* had been eroded and that [this Court will] so conclude." *Quill*, App. A13. The North Dakota Supreme Court cited no decision of this Court questioning the continued validity of *Bellas Hess*. Instead, the court adopted as the basis for its opinion Justice Fortas' dissent, buttressed by what it perceived as "tremendous social, economic, commercial and legal innovations since 1967," and concluded that the dissent accurately "forecast" the "diminishment" in value of *Bellas Hess* as precedent. *Quill*, App. A8, A10.

In *Bellas Hess*, Illinois attempted to require use tax collection by an out-of-state vendor whose contacts with Illinois consisted of regularly mailing catalogs and advertising flyers to Illinois residents and regularly delivering ordered goods via mail or common carrier. 386 U.S. at 754-55. Although National Bellas Hess did not own any tangible property, real or personal, in Illinois, it had sizeable mail order operations (approximately $60 million in total annual sales) and conducted a significant level of sales and advertising in Illinois.[7]

[7] National Bellas Hess made net sales of approximately $2.1 million into Illinois over a 15-month period, mailed semi-annual catalogs listing over 4,000 products to over 5 million customers, and sent advertising flyers to an even larger list of customers. *Bellas Hess*, 386 U.S. at 761. (Fortas, J., dissenting.) National Bellas Hess sold a substantial part of its merchandise on credit payment plans, accepted checks drawn on Illinois banks, and sold goods C.O.D. *Id.* The company provided merchandise guarantees to its customers, allowing returns, exchanges or refunds. It solicited names of potential new customers from existing customers and accepted orders by telephone. *Bellas Hess*, 386 U.S. at 761 n.2. *See* National Bellas Hess 1967 Catalog, Spring and Summer ed., *Bellas Hess*, Record on Appeal (O.T. 1966, No. 241).

This Court held that because the vendor's only contacts with the state were by mail and common carrier, Illinois' requirement that National Bellas Hess collect use tax on mail order sales made to Illinois residents violated both the due process clause of the fourteenth amendment and the commerce clause.[8] In reaching this result, this Court applied a long established tax nexus test that focused on whether the vendor maintained a physical presence (retail outlets, solicitors or property) within the taxing state. The Court reviewed approximately 30 years of jurisprudence and held:

> But the Court has never held that a State may impose the duty of use tax collection and payment upon a seller whose only connection with customers in the State is by common carrier or the United States mail.

386 U.S. at 758.

This Court also recognized that to permit Illinois to impose use tax collection and payment obligations on a vendor who did not maintain an in-state physical presence would create "unjustifiable local entanglements" of interstate commerce. *Bellas Hess*, 386 U.S. at 760. "The many variations in rates of tax, in allowable exemptions, and in administrative and recordkeeping requirements, could entangle National [Bellas Hess'] interstate business in a

[8] Tax nexus criteria under the due process and commerce clauses are similar. *Bellas Hess*, 386 U.S. at 756; *Trinova Corp. v. Mich. Dept. of Treasury*, 111 S. Ct. 818, 828-29 (1991). Due process requires that there be "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax," *Bellas Hess*, 386 U.S. at 756, and the commerce clause requires that the tax "[be] applied to an activity with a substantial nexus with the taxing State, . . . not discriminate against interstate commerce, and [be] fairly related to the services provided by the State." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

virtual welter of complicated obligations to local jurisdictions." *Bellas Hess*, 386 U.S. at 759-60.

Mr. Justice Fortas dissented, positing that "economic benefits" derived from a state should create tax nexus. *Bellas Hess*, 386 U.S. at 761 (Fortas, J., dissenting). The North Dakota Supreme Court candidly rejected the majority opinion and adopted the "economic benefits" test expressed by Justice Fortas as law to establish tax jurisdiction over Quill. It is this departure from established precedent by the court below that forces Quill to petition this Court for writ of certiorari.

This Court Has Consistently Applied *Bellas Hess*.

In *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959), Justice Clark reviewed this Court's prior decisions regarding unconstitutional state taxes. While conceding that those decisions were sometimes confusing and inconsistent he stated: "From the quagmire there emerge, however, some firm peaks of decision which remain unquestioned." 358 U.S. at 458. For the last quarter century, this Court's decision in *Bellas Hess* has been one of those "firm peaks of decision".[9]

This Court has consistently applied *Bellas Hess* and has never held that communicating with customers by mail or telephone is sufficient to provide tax nexus. The continuing validity of *Bellas Hess* was recognized by this Court as recently as *Goldberg v. Sweet*, 488 U.S. 252 (1989). Therein, this Court was called upon to decide whether an Illinois tax on interstate telecommunications violated

[9] *Bellas Hess* has been cited by this Court and by lower state and federal courts in approximately 75 cases decided over the last quarter-century. *See* App. A76-A81.

the commerce clause. In deciding that issue, this Court cited *Bellas Hess* as relevant authority and expressed doubts "that termination of an interstate telephone call, by itself" provided sufficient nexus for a state to tax that telephone call.[10] *Goldberg v. Sweet*, 488 U.S. at 263. This strong statement by this Court in *Goldberg* is consistent with the holding in *Bellas Hess* that vendors who "do no more than communicate with customers" in the taxing state are constitutionally protected from use tax collection duties. *Bellas Hess*, 386 U.S. at 758.

In 1988 this Court implicitly reaffirmed its *Bellas Hess* holding in *D.H. Holmes Co. v. McNamara*, 486 U.S. 24 (1988). In *D.H. Holmes*, the Court addressed an attempt by Louisiana to impose use tax liability on D.H. Holmes, a Louisiana retailer, for catalogs it had printed out of state and shipped to Louisiana. D.H. Holmes maintained its principal place of business in New Orleans, operated 13 stores there and employed approximately 5,000 workers in Louisiana. 486 U.S. at 26-27. D.H. Holmes argued that it should be treated like the mail order company in *Bellas Hess*, "apparently view[ing] its catalog distribution as analogous to the mail order solicitation in *National Bellas Hess*." *D.H. Holmes*, 486 U.S. at 33. Chief Justice Rehnquist, in a unanimous decision, restated with approval this Court's holding in *Bellas Hess* and distinguished D.H. Holmes on the ground that the retailer was clearly physically present in Louisiana.

Contrary to the North Dakota Supreme Court's suggestion (*Quill*, App. A15), this Court did not abandon the

[10] All parties in *Goldberg v. Sweet* conceded that the "substantial nexus" test of *Complete Auto* had been satisfied because each party owned property located in Illinois. 488 U.S. at 256 n.6, 258 n.9, 260.

nexus standard set forth in *Bellas Hess* when deciding *National Geographic Society v. California Board of Equalization*, 430 U.S. 551 (1977). In *National Geographic*, the vendor maintained two offices and up to eight employees in California to solicit advertising for its magazine. *National Geographic*, 430 at 552, 555-56; 547 P.2d 458, 459 (Cal. 1976). National Geographic also operated a mail order business from its facilities located in the District of Columbia and Maryland. California sought to require National Geographic to collect use tax from mail order sales of merchandise to California residents. The California Supreme Court agreed and stated:

> Where an out-of-state seller conducts a substantial mail order business with residents of a state . . . the *slightest presence* within such taxing state independent of any connection through interstate commerce will permit the state constitutionally to impose on the seller the duty of collecting the use tax from such mail order purchasers and the liability for failure to do so.

National Geographic, 430 U.S. at 555-56 quoting *National Geographic*, 547 P.2d 458, 462 (Cal. 1976) (emphasis added by the Court).

While upholding California's claim, this Court specifically rejected California's "slightest presence" test, stating:

> [N]ot every out-of-state seller may constitutionally be made liable for payment of the use tax on merchandise sold to purchasers in the [taxing] State.

430 U.S. 551, 555 (1976).

This Court focused on the physical presence of National Geographic in California, not the "economic benefits" derived from the state or the "slightest presence" theory advanced by the California court. *National Geographic*,

430 U.S. at 556. This is demonstrated by the Court's reiteration in *National Geographic* of the holding in *Bellas Hess*:

> The Court's opinion [in *Bellas Hess*] carefully underscored, however, the 'sharp distinction . . . between mail order sellers with retail outlets, solicitors, or property within [the taxing] State and those [like National Bellas Hess] who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business. *Id.* at 758. *Appellant [National Geographic] Society clearly falls into the former category.*

National Geographic, 430 U.S. at 559 (emphasis added).

This Court's decision in *National Geographic* is consistent with *Bellas Hess*.

The North Dakota Supreme Court's contention that *Bellas Hess* was eroded by *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), is also wrong. That court correctly recognized that *Complete Auto* sets forth the relevant tests for analyzing whether a state's tax violates the commerce clause. The first prong of the *Complete Auto* test requires a finding of an "activity with a substantial nexus with the taxing State." *Complete Auto*, 430 U.S. at 279. However, far from abandoning *Bellas Hess*, this Court's later decisions make it abundantly clear that *Bellas Hess* is entirely consistent with *Complete Auto*. For example, in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981), this Court noted that *Bellas Hess* is the touchstone of the first prong of *Complete Auto*:

> Under this threshold test, the interstate business must have a substantial nexus with the State before *any* tax may be levied on it. See *National Bellas Hess, Inc. v. Illinois Revenue Dept.*, 386 U.S. 753 (1967).

Commonwealth Edison, 453 U.S. at 626 (emphasis in original). Thus, far from being rejected, the *Bellas Hess* decision was directly incorporated into the *Complete Auto* commerce clause test.[11]

The Standards for Personal Jurisdiction and Tax Nexus Differ.

The North Dakota Supreme Court's reliance on *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), and other personal jurisdiction cases is misplaced. The North Dakota Supreme Court fails to note that this Court in *Bellas Hess* refused to adopt a tax standard fashioned from these personal jurisdiction cases. In *Bellas Hess*, the State of Illinois urged this Court to adopt the "economic benefits" test that had already been applied in the personal jurisdiction cases for at least ten years. Appellee's Brief at 32-34, *Bellas Hess* (O.T. 1966, No. 241). This Court declined to adopt that test to establish tax nexus and held in *Bellas Hess* that even continuous and systematic solicitation by mail would not create tax nexus as long as the taxpayer did not maintain a physical presence in the state. This Court has consistently distinguished between these two standards, tax nexus and personal juris-

[11] This Court's decisions in *Tyler Pipe Industries, Inc. v. Washington Dept. of Revenue*, 483 U.S. 232 (1987), and *Standard Pressed Steel v. Washington Dept. of Revenue*, 419 U.S. 560 (1975), do not support the North Dakota Court's refusal to follow *Bellas Hess*. In both cases this Court focused on the substantial in-state activities of the taxpayers to uphold a finding of tax nexus. Standard Pressed Steel had one full-time employee and a group of other employees that regularly visited with the company's principal customer in Washington. 419 U.S. at 561. Tyler Pipe had independent sales representatives who acted daily on behalf of Tyler Pipe in calling on its customers and in soliciting orders in Washington. 483 U.S. at 232, 249.

diction. *See Travelers' Health Assoc. v. Virginia*, 339 U.S. 643, 653-54 (1950) (Douglas, J., concurring):

> It is the nature of the state's action that determines the kind or degree of activity in the state necessary for satisfying the requirements of due process.
>
> * * * * *
>
> The requirements of due process may demand more or less minimal contacts . . . depending on what the pinch of the decision is or what [a state] requires of the foreign corporation.

The North Dakota Supreme Court's analysis confuses the differing standards necessary to establish personal jurisdiction or tax nexus.

The North Dakota Supreme Court's Decision Violates The Doctrine Of Federal Supremacy.

The North Dakota Supreme Court attempts to justify its refusal to follow precedent by labeling it as obsolete, citing *North Dakota v. Snyder's Drug Stores, Inc.*, 414 U.S. 156 (1973). *Quill*, App. A10. In *Snyder*, the state court relied upon precedent which was abandoned earlier by the U.S. Supreme Court. Although this Court had not had the occasion to overrule *Liggett Co. v. Baldridge*, 278 U.S. 105 (1928), it had clearly abandoned the case as authority. This Court was most moderate in its reversal of the North Dakota Supreme Court, although it legitimately could have questioned that court's failure to follow this Court's more recent decisions.

In this case the North Dakota court concludes that because of the "tremendous social, economic, commercial, and legal innovations since 1967" this Court's decision in

Bellas Hess is obsolete.[12] *Quill*, App. A10. Without regard to the efficacy of the North Dakota Supreme Court's analysis, that court does not have the prerogative of refusing to follow precedent of this Court.

When a question of federal law is submitted to a state court, it is the duty of that court "to administer the law prescribed by the Constitution . . . as construed by [the Supreme] Court." *South Carolina v. Bailey*, 289 U.S. 412, 420 (1933). "The determination by this Court of [a federal] question is binding upon state courts and must be followed, any state law, decision or rule to the contrary notwithstanding." *Chesapeake & Ohio Ry. v. Marlin*, 283 U.S. 209, 221 (1931).

In *Cooper v. Aaron*, 358 U.S. 1 (1958), this Court reiterated basic constitutional propositions which are settled doctrine, among which is that state courts must follow this Court's decisions. More recently in *Hutto v. Davis*, 454 U.S. 370, 375 (1982), this Court again stated "[U]nless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judge of those courts may think it to be."

In the recent decision of *Rodriguez de Quijas v. Shearson/American Express Inc.*, 490 U.S. 477 (1989), this Court instructs that "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decision, the [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." 490 U.S. at 484. In *The Mayor v. Cooper*, 73 U.S. (6 Wall) 247, 253 (1867), this Court recognized that "[a] different principle would lead to the most mischievous consequences. The courts of the several States might determine the same questions in different ways. There would be no uniformity of decisions."

[12] The North Dakota Supreme Court ignored this Court's recent refusal to grant certiorari in *Cally Curtis Co. v. Groppo*, 572 A.2d 302 (Conn. 1990), *cert. denied* 111 S.Ct. 77 (1990), a case raising the same issue as *Quill*. On June 17, 1991, this Court also denied certiorari in *SFA Folio Collections, Inc. v. Bannon*, 585 A.2d 666 (Conn. 1991), *cert. denied sub nom. Commissioner of Revenue v. SFA Folio Collections, Inc.*, 59 U.S.L.W. 3838 (U.S. 1991), where the State of Connecticut urged this Court to reverse *Bellas Hess*.

This doctrine has equal application to the Supreme Court of North Dakota. That court makes no attempt to distinguish the facts in *Bellas Hess*. Rather it literally reverses *Bellas Hess*, calling this Court's decision obsolete. The North Dakota Supreme Court's decision is clearly "an indefensible brand of judicial activism," *Rodriguez*, 490 U.S. at 486 (Stevens, J., dissenting), and will result in much confusion if not reviewed by this Court.

The North Dakota court departs from the tax nexus standard consistently followed for approximately twenty-five years. The supreme courts of Connecticut and Pennsylvania have recently followed *Bellas Hess*, as has a federal district court in California.[13] If this Court does not review the North Dakota decision, out-of-state mail order

[13] *SFA Folio Collections, Inc. v. Bannon*, 585 A.2d 666 (Conn. 1991), *cert. denied sub nom. Commissioner of Revenue v. SFA Folio Collections, Inc.*, 59 U.S.L.W. 3838 (U.S. 1991); *Cally Curtis Co. v. Groppo*, 572 A.2d 302 (Conn. 1990), *cert. denied*, 111 S. Ct. 77 (1990); *Bloomingdale's By Mail, Ltd. v. Commonwealth of Pennsylvania*, 567 A.2d 773 (Pa. Commw. Ct. 1989) *aff'd per curiam*, 591 A.2d 1047 (Pa. 1991); *Direct Marketing Association, Inc. v. Bennett*, No. Civ. S-88-1067 (E.D. Cal., June 28, 1991) (transcript of the court's decision and order for summary judgment are reproduced at App. A67-A75).

vendors are left with conflicting standards that eliminate any marked degree of certainty applicable to interstate commerce and due process concerns.[14] If allowed to stand without review, the North Dakota decision will proliferate confusion in sales and use tax administrative practices and judicial review of those practices in other states.[15] If applied on a national basis, the North Dakota ruling would

[14] One commentator observes:

> Sound policy reasons support the Court's view that economic presence alone does not create the required nexus. Standards using communicative and incidental contacts do not achieve any marked degree of certainty, one goal of due process. With respect to the commerce clause, compliance with over 6,500 taxing jurisdictions is simply too burdensome for the majority of the mail order industry's members: small mail order vendors. On their own initiative, states have legislated away these federal constitutional safeguards.

White, *State Use Tax Collection*, 42 Fla. L.R. 775, 801 (1990).

[15] *Compare Direct Marketing Association, Inc. v. Bennett*, No. Civ. S-88-1067 (E.D. Ca. 1991) App. A67; *Aldens, Inc. v. Miller*, 466 F. Supp. 379 (S.D. Iowa 1979) *aff'd*, 610 F.2d 538 (8th Cir.), *cert. denied*, 446 U.S. 919 (1980); *Sturbridge Yankee Workshop, Inc. v. State Board of Equalization*, No. 512584 (Sacramento Superior Court, Cal. January 29, 1991); *Land's End, Inc. v. California State Board of Equalization*, No. 620135 (San Diego Superior Court, Cal. 1991); *SFA Folio Collections, Inc. v. Bannon*, 585 A.2d 666 (Conn. 1991), *cert. denied sub nom. Commissioner of Revenue v. SFA Folio Collections, Inc.*, 59 U.S.L.W. 3838 (U.S. 1991); *Cally Curtis Co. v. Groppo*, 572 A.2d 302 (Conn. 1990), *cert. denied*, 111 S.Ct. 77 (1990); *Burke & Sons Oil Co. v. Director of Revenue*, 757 S.W.2d 278 (Mo. App. 1988); *Book-of-the-Month Club, Inc. v. Porterfield*, 268 N.E. 2d 272 (Ohio 1971); *Bloomingdale's By Mail, Ltd. v. Commonwealth of Pennsylvania*, 567 A.2d 773 (Pa. Commw. Ct. 1989), *aff'd per curiam*, 591 A.2d 1047 (Pa. 1991); *L.L. Bean, Inc. v. Commonwealth of Pennsylvania*, 516 A.2d 820 (Pa. Commw. Ct. 1986); *with SFA Folio Collections, Inc. v. Huddleston*, No. 89-3015-III (Davidson County Chancery Ct. Tenn. March 11, 1991); *Bloomingdale's By Mail, Ltd. v. Huddleston*, No. 89-3017-II (Davidson County Chancery Ct. Tenn. March 8, 1991).

subject all out-of-state mail order vendors to the multiple burdens of collecting and paying use taxes according to the laws of each state and local subdivision to which they ship merchandise, solely by reason of their use of the United States mail to send catalogs into those jurisdictions.[16] *Bellas Hess*, 386 U.S. at 759 n.12.

This impediment on interstate business is "neither imaginary nor remote." *Bellas Hess*, 386 U.S. at 759. Out-of-state mail order vendors would be compelled to stop using

[16] The compliance problems associated with the variances in the laws of state and local taxing jurisdictions are extensive. *See State Taxation of Interstate Commerce: Hearing on S.1510 before the Subcomm. on Taxation and Debt Mgmt. of the Senate Committee on Finance*, 99th Cong., 1st Sess. 80-82 (1985) ["Hearing on S.1510"] (testimony of Alan Glazer on behalf of the Direct Marketing Ass'n); *Interstate Sales Tax Collection Act of 1987 and the Equity in Interstate Competition Act of 1987: Hearings on H.R. 1242, H.R. 1891 and H.R. 3521*, before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary, 100th Cong, 2nd Sess. 129-130 (1988) ["Hearings on H.R. 1242, H.R. 1891 and H.R. 3521"] (testimony of Nat Standing of J.C. Penney Company stating that the administrative costs of compliance "are enormous"); Levering, *Federal Legislation*, 4 N.Y.U. Inst. on State and Local Taxation, ch. 8 at § 8.03 (1986).

Federal legislation proposed in the wake of *Bellas Hess* would have allowed collection of local use taxes *only* if uniform as to rate, base and administration by the state. *See* S.282, 93rd Cong., 1st Sess. (1973); S.2092, 93rd Cong., 1st Sess. (1973); and S.2173, 95th Cong., 1st Sess. (1977).

Current legislative proposals also seek uniformity and the elimination of the tremendous compliance burdens by establishing uniform rates, exemptions, collection allowances, filing requirements and audit procedures. *See, e.g.*, Committee on State Taxation of the Council of State Chambers of Commerce, *COST Endorses Compromise on Bellas Hess Legislation*, State Tax Report Nos. 253 at 1 (Sept. 26, 1990); 244 at 1 (Dec. 15, 1989). The reluctance of Congress to enact federal legislation without agreed uniformity among the state and local taxing units highlights the numerous compliance problems facing out-of-state mail order vendors.

the mails to send advertising and goods to customers unless these vendors are able to undertake the extraterritorial obligation of collecting taxes.[17] For a mail order firm whose advertising runs nationwide, compliance means acting as a tax collector for each of the states and local subdivisions that impose sales and use taxes, approximately 6500 jurisdictions.[18] The consequences of North Dakota's decision is to close interstate markets to out-of-state vendors unless they sustain the burden of acting as tax collectors for the uncoordinated sales and use tax systems of states and municipalities throughout the nation. *Bellas Hess*, 386 U.S. at 759.

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[17] The complexities of complying with these various tax laws range from variations in rates of tax, allowable exemptions, and administrative and recordkeeping requirements. *Bellas Hess*, 386 U.S. at 759.

[18] When this Court considered *Bellas Hess*, it considered the burdens that would be caused by compliance with 2300 tax jurisdictions. *Bellas Hess*, 386 U.S. at 759 n.12. Professor Archibald Cox set forth before this Court in explicit detail the disproportionate burdens which would be placed on interstate commerce if state and local governments were able to impose use tax collection burdens on out-of-state vendors who conducted a general interstate business. Appellant's Brief, App. B at 55-69, *Bellas Hess* (O.T. 1966, No. 241).

The compliance obligations, based on the number of taxing jurisdictions, have increased almost threefold with the passage of time. Advisory Commission on Intergovernmental Relations, *State and Local Taxation of Out-of-State Mail Order Sales* at 6, 11 (April 1986) ["ACIR Report"]; Note, *Collecting the Use Tax on Mail-Order Sales*, 79 Geo. L.J. 535, 539 (1991).

II.

THIS COURT SHOULD GRANT CERTIORARI TO CORRECT THE NORTH DAKOTA SUPREME COURT'S IMPROPER IMPOSITION OF LIABILITY RETROACTIVELY TO JULY 1, 1987.

If North Dakota and each of the states that has enacted "anti-*Bellas Hess*"[19] statutes can successfully impose tax liability, retroactive to the date of enactment of that legislation, the liabilities for uncollected use taxes may total billions of dollars.[20] That retroactive application, countenanced by the court below, would economically destroy a huge segment of the mail order industry.

The mail order industry has relied upon the *Bellas Hess* doctrine for a quarter-century. Lower courts, with the exception of North Dakota, have consistently applied the physical presence test expressed in *Bellas Hess* to determine tax nexus.[21] A retroactive abandonment of that stan-

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[19] "Anti-*Bellas Hess*" legislation refers to legislation that makes advertising by catalog or otherwise a sufficient nexus for sales and use tax purposes.

[20] *See ACIR Report* at 3-6, 29-35; *Collection of State Sales and Use Taxes by Out-of-State Vendors: Hearing on S.639 and S.1099 for the Subcomm. on Taxation and Debt Mgmt. of the Sen. Comm. on Finance*, 100th Cong., 1st Sess. 15-18 (1987) ["Hearing on S.639 and S.1099"] (testimony of North Dakota Governor Sinner estimating revenue loss); *Hearings on H.R. 1242, H.R. 1891 and H.R. 3521*, at 154-182 (statement of Warren G. Stambaugh on behalf of the National Conference of State Legislatures).

[21] Two Tennessee trial courts have also refused to apply *Bellas Hess*. One case (*Bloomingdale's By Mail, Ltd. v. Huddleston*, No. 89-3017-II (Davidson Cty. Chancery Ct., Tenn. March 8, 1991), *appeal docketed*, No. 01-S-01-9106-CH-00047) is on appeal to the Tennessee Supreme Court which just last year recognized the continued validity of *Bellas Hess* in *Pearle Health Services, Inc. v. Taylor*, 799 S.W.2d 655 (Tenn. 1990). The other trial court decision, *SFA Folio Collections, Inc. v. Huddleston*, No. 89-3015-III (Davidson Cty. Chancery Ct., Tenn. March 11, 1991), has been placed on inactive status pending the appeal of *Bloomingdale's By Mail*.

dard as is mandated by the North Dakota decision will work economic havoc upon the industry and unfairly penalize those mail order vendors who have relied upon this Court's pronouncement. This result obtains because most mail order vendors do not have the ability to collect taxes on prior sales.[22] These vendors would thus be left with a direct tax liability. *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 347 (1954); *Bellas Hess*, 386 U.S. at 757 n.9.

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[22] *See Interstate Sales Tax Collection Act of 1987: Hearing on H.R. 1242 before the Subcomm. on Select Revenue Measures for the House Comm. on Ways and Means*, 100th Cong., 1st Sess. 130-134 (1987) (testimony and prepared statement of Alan Glazer on behalf of the Direct Marketing Ass'n regarding difficulties arising from potential nonpayment of tax by purchasers), and at 152-153 (testimony of William T. End of L.L. Bean, Inc. discussing cost of post-sales collection efforts).

Congress has considered prospective legislation addressing use tax collection by mail order businesses. S.282, 93rd Cong., 1st Sess. (1973); S.2092, 93rd Cong., 1st Sess. (1973); S.2811, 93rd Cong., 1st Sess. (1973); S.2173, 95th Cong., 1st Sess. (1977); S.983, 96th Cong., 1st Sess. (1979); S.1510, 99th Cong., 1st Sess. (1985); H.R. 3549, 99th Cong., 1st Sess. (1985); S.639, 100th Cong., 1st Sess. (1987); S.1099, 100th Cong., 1st Sess. (1987); H.R. 1242, 100th Cong., 1st Sess. (1987); H.R. 3521, 100th Cong., 1st Sess. (1987); H.R. 1891, 100th Cong., 2nd Sess. (1987); S.2368, 100th Cong., 2nd Sess. (1988); S.480, 101st Cong., 1st Sess. (1989); and H.R. 2230, 101st Cong., 1st Sess. (1989).

One reason that federal legislation has not been enacted is the various state and local governments' inability to agree upon some method to facilitate collection of taxes at varying rates on different tax bases for the thousands of taxing jurisdictions that impose sales or use taxes. *See Hearings on H.R. 1242, H.R. 1891 and H.R. 3521* at 60-61 (exchange between Rep. Rodino and North Dakota Governor George Sinner regarding administrative and compliance problems associated with collecting taxes for multiple jurisdictions), at 362-364 (testimony of Cathy Reynolds, Councilwoman-at-Large, Denver, Colo., regarding the "long and arduous process" of a proposed state and local compromise), and at 391-392 (exchange between Rep. Fish and Ms. Reynolds indicating inability to agree upon legislative language).

CONCLUSION

The North Dakota ruling refuses to follow a controlling decision of this Court and is squarely opposed to other state supreme court decisions. The decision is inconsistent with the concept of a national market, which underlies both the commerce and due process clauses. If not reviewed by this Court, the North Dakota decision will proliferate confusion in state tax laws administered in other states not only for mail order businesses but also for all concerns that conduct a general interstate business where their only contact with the state is by interstate telephone, United States mail or common carrier.

This petition for a writ of certiorari to the Supreme Court of North Dakota should be granted.

Respectfully submitted,

Dated: August 1, 1991

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Supreme Court of the United States

OCTOBER TERM, 1991

QUILL CORPORATION,

Petitioner,

v.

STATE OF NORTH DAKOTA,
by and through its Tax Commissioner,
HEIDI HEITKAMP,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of North Dakota

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

QUILL CORPORATION,

Petitioner,

v.

STATE OF NORTH DAKOTA,
by and through its Tax Commissioner,
HEIDI HEITKAMP,

Respondent.

Petition for Writ of Certiorari to the
Supreme Court of the State of North Dakota

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota, by and through its Tax Commissioner, Heidi Heitkamp,

Plaintiff, Appellant and Cross-Appellee

v.

Quill Corporation,

Defendant, Appellee and Cross-Appellant

Civil No. 900257

Appeal from the District Court for Burleigh County, South Central Judicial District, the Honorable Benny A. Graff, Judge.

REVERSED.

Opinion of the Court by VandeWalle, Justice.

Nicholas J. Spaeth, Attorney General, Bismarck, for plaintiff, appellant and cross-appellee.

John E. Gaggini (argued), and Don S. Harnack (appearance), of McDermott, Will & Emery, Chicago, IL, and William P. Pearce (appearance), of Pearce & Durick, Bismarck, for defendant, appellee and cross-appellant.

State v. Quill Corporation
Civil No. 900257

VANDEWALLE, Justice.

The State of North Dakota appealed from a district court summary judgment declaring that subsections (6) and (7) of Section 57-40.2-01, N.D.C.C., are unconstitutional as applied to Quill Corporation [Quill], and that the State therefore may not require Quill to collect and remit use tax on its sales to North Dakota consumers. Quill cross-appealed from that part of the summary judgment dismissing its action under 42 U.S.C. § 1983 and denying attorney's fees under 42 U.S.C. § 1988. We hold that Section 57-40.2-01, N.D.C.C., is constitutional as applied to Quill and accordingly we reverse the summary judgment.

I

Quill is a Delaware corporation with offices and warehouses in Illinois, California, and Georgia. Quill sells office supplies, stationery, and equipment, offering over 9,500 different products ranging from paper clips to computers. Its annual sales are in excess of $200,000,000.

Quill solicits business through its numerous catalogs and flyers, advertisements in nationally distributed "card packs," advertisements in national periodicals and trade journals, and telephone solicitation of current customers. Of the more than 200,000 orders Quill receives monthly, approximately one-half are by telephone. The remaining half are received by mail, fax, telex, and by direct computer contact.

Quill's annual sales to nearly 3,500 active[1] North Dakota customers are just under $1,000,000. By sales volume, it

[1] Quill describes an "active" customer as one who has purchased from Quill within the past 24 months.

is the sixth largest seller of office supplies in North Dakota. Quill each year mails over 60 different catalogs and flyers to its North Dakota customers. This amounts to more than 230,000 separate pieces of mail, weighing over 24 tons, sent into the State annually by Quill.

North Dakota imposes a use tax upon property purchased for storage, use, or consumption within the State. Section 57-40.2-01, N.D.C.C. The rate is equivalent to the corollary sales tax. See Sections 57-39.2-02.1 and 57-40.2-02.1, N.D.C.C. A credit is given if sales or use taxes have been paid to another state upon the same property. Section 57-40.2-11, N.D.C.C.

Although the consumer is ultimately responsible for the tax, a "retailer maintaining a place of business in this state" is required to collect the tax from the consumer and remit it to the State. Section 57-40.2-07, N.D.C.C. Section 57-40.2-01, N.D.C.C., defines "retailer" and "retailer maintaining a place of business in this state":

> "6. 'Retailer' includes every person engaged in the business of selling tangible personal property for use within the meaning of this chapter . . . . A retailer also includes every person who engages in regular or systematic solicitation of a consumer market in this state by the distribution of catalogs, periodicals, advertising flyers, or other advertising, or by means of print, radio or television media, by mail, telegraphy, telephone, computer data base, cable, optic, microwave, or other communication system.
>
> "7. 'Retailer maintaining a place of business in this state', or any like term, means any retailer having or maintaining within this state, directly or by a subsidiary, an office, distribution house, sales house, warehouse, or other place of business, or any agent operating within this state . . . . It also includes every person who engages

> in regular or systematic solicitation of sales of tangible personal property in this state by the distribution of catalogs, periodicals, advertising flyers, or other advertising, by means of print, radio or television media, or by mail, telegraphy, telephone, computer data base, cable, optic, microwave, or other communication system for the purpose of effecting retail sales of tangible personal property."

Section 81-04.1-01-03.1(3) of the North Dakota Administrative Code defines "regular or systematic solicitation" as "three or more separate transmittances of any advertisement or advertisements" during a specified twelve-month period.[2]

Quill has refused to collect and remit use taxes on goods purchased and used by Quill's customers in North Dakota. The State, through its Tax Commissioner, commenced this declaratory judgment action under Chapter 32-23, N.D.C.C., seeking a declaration that Quill is a "retailer" and a "retailer maintaining a place of business in this state" which must collect and remit the applicable use tax on its sales to customers in this State.

Quill answered, alleging that Chapter 57-40.2, N.D.C.C., as applied to Quill, is violative of the Due Process Clause and Commerce Clause of the United States Constitution as interpreted in *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753, 87 S.Ct. 1389, 18 L.Ed.2d 505 (1967). Quill filed a counterclaim seeking relief under

[2] Section 81-04.1-01-03.1, N.D.A.C., inexplicably states that the definitions therein apply to subsection 5 of Section 57-40.2-01, N.D.C.C. However, the definitions in the Administrative Code section have no logical relationship to subsection 5, and it is therefore apparent that this is an erroneous reference. The parties have not raised this as an issue.

42 U.S.C. § 1983 for alleged violations of its Due Process and Commerce Clause rights, and seeking attorney's fees under 42 U.S.C. § 1988.

On cross-motions for summary judgment, the district court held that the State could not constitutionally require Quill to collect and remit use taxes. Relying principally upon *Bellas Hess*, the district court held that the State had failed to establish a sufficient nexus between Quill and the State, and that subsections (6) and (7) of Section 57-40.2-01 were therefore unconstitutional as applied to Quill. The court dismissed Quill's counterclaim seeking relief under 42 U.S.C. §§ 1983 and 1988.

Judgment was entered accordingly and the State appealed. Quill cross-appealed from that part of the judgment dismissing its counterclaim.

II

A

Quill concedes that its solicitation of sales in North Dakota meets the statutory and administrative guidelines for a "retailer maintaining a place of business in this state." Thus, the dispositive issue on appeal is whether the State may constitutionally require Quill to collect and remit the use tax.

Any discussion of imposition of the duty of collecting a use tax upon an out-of-state seller must begin with an analysis of *Bellas Hess*, *supra*. National Bellas Hess was incorporated in Delaware and had its principal place of business in Missouri. Illinois attempted to require National Bellas Hess to collect and remit use tax on mail order sales into that state. The United States Supreme Court summarized the constitutional background:

"National argues that the liabilities which Illinois has thus imposed violate the Due Process Clause of the Fourteenth Amendment and create an unconstitutional burden upon interstate commerce. These two claims are closely related. For the test whether a particular state exaction is such as to invade the exclusive authority of Congress to regulate trade between the States, and the test for a State's compliance with the requirements of due process in this area are similar. . . . As to the former, the Court has held that 'State taxation falling on interstate commerce * * * can only be justified as designed to make such commerce bear a fair share of the cost of the local government whose protection it enjoys.' . . . And in determining whether a state tax falls within the confines of the Due Process Clause, the Court has said that the 'simple but controlling question is whether the state has given anything for which it can ask return.' . . . The same principles have been held applicable in determining the power of a State to impose the burdens of collecting use taxes upon interstate sales. Here, too, the Constitution requires 'some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.' " *Bellas Hess*, *supra*, 386 U.S. at 756, 87 S.Ct. at 1391, 18 L.Ed.2d at 508-509 (citations omitted).

Characterizing National Bellas Hess as a mail order seller which did "no more than communicate with customers in the State by mail or common carrier," [*Bellas Hess*, *supra*, 386 U.S. at 758, 87 S.Ct. at 1392, 18 L.Ed.2d at 510], the Court, in a 6-3 decision, held that this connection with Illinois was insufficient to require National Bellas Hess to collect and remit the use tax. The Court drew a "bright line" distinction between mail order sellers whose only connection with its customers in the taxing state was by common carrier or the United States mail and those with more significant connections with the state.

The Court also stressed the substantial administrative burden upon National Bellas Hess if it were required to collect and remit use taxes to numerous jurisdictions. The Court noted that "[t]he many variations in rates of tax, in allowable exemptions, and in administrative and record-keeping requirements could entangle National's interstate business in a virtual welter of complicated obligations to local jurisdictions." *Bellas Hess*, *supra*, 386 U.S. at 759-760, 87 S.Ct. at 1393, 18 L.Ed.2d at 510 (footnotes omitted).

Justice Fortas, speaking for the dissenters in *Bellas Hess*, formulated a different approach for analyzing the contacts between a taxing state and an out-of-state seller necessary to satisfy Due Process and Commerce Clause requirements. Justice Fortas suggested a more case-specific approach which would take into consideration the nature and extent of the solicitation and exploitation of the state's consumer market:

"There should be no doubt that this large-scale, systematic, continuous solicitation and exploitation of the Illinois consumer market is a sufficient 'nexus' to require Bellas Hess to collect from Illinois customers and to remit the use tax, especially when coupled with the use of the credit resources of residents of Illinois, dependent as that mechanism is upon the State's banking and credit institutions. Bellas Hess is not simply using the facilities of interstate commerce to serve customers in Illinois. It is regularly and continuously engaged in 'exploitation of the consumer market' of Illinois . . . by soliciting residents of Illinois who live and work there and have homes and banking connections there, and who, absent the solicitation of Bellas Hess, might buy locally and pay the sales tax to support their State. Bellas Hess could not carry on its business in Illinois, and particularly its substantial credit business, without utilizing Illinois banking and credit facilities." *Bellas*

Hess, *supra*, 386 U.S. at 761-762, 87 S.Ct. at 1394, 18 L.Ed.2d at 511-512 (Fortas, J., dissenting) (citations omitted).

Justice Fortas forecast the rationale for the diminishment of the constitutional significance of "physical presence" in such cases:

> "Bellas Hess enjoys the benefits of, and profits from the facilities nurtured by, the State of Illinois as fully as if it were a retail store or maintained salesmen therein. Indeed, if it did either, the benefit that it received from the State of Illinois would be no more than it now has—the ability to make sales of its merchandise, to utilize credit facilities, and to realize a profit; and, at the same time, it would be required to pay additional taxes. Under the present arrangement, it conducts its substantial, regular, and systematic business in Illinois and the State demands only that it collect from its customer-users—and remit to the State—the use tax which is merely equal to the sales tax which resident merchants must collect and remit. To excuse Bellas Hess from this obligation is to burden and penalize retailers located in Illinois who must collect the sales tax from their customers. In Illinois the rate is 3½%, and when it is realized that in some communities the sales tax requires, in effect, that as much as 5% be added to the amount that customers of local, tax-paying stores must pay, the importance of the competitive discrimination becomes apparent. While this advantage to out-of-state sellers is tolerable and a necessary constitutional consequence where the sales are occasional, minor and sporadic and not the result of a calculated, systematic exploitation of the market, it certainly should not be extended to instances where the out-of-state company is engaged in exploiting the local market on a regular, systematic, large-scale basis. In such cases, the difference between the nature of the business conducted by the mail order house and by the local enterprise is not entitled to constitutional significance." *Bellas Hess*, *supra*, 386 U.S. at 762-763, 87 S.Ct. at 1394-1395, 18 L.Ed.2d at 512 (Fortas, J., dissenting).

The dissent also disputed the extent of the administrative burden which would be placed upon National Bellas Hess, noting that the majority's stated fear of entanglement of interstate commerce "vastly underestimates the skill of contemporary man and his machines." *Bellas Hess*, *supra*, 386 U.S. at 766, 87 S.Ct. at 1396, 18 L.Ed.2d at 514 (Fortas, J., dissenting). Justice Fortas therefore concluded that neither the Commerce Clause nor the Due Process Clause excused National Bellas Hess from complying with the Illinois use tax statutes.

B

The United States Supreme Court has not revisited this precise issue since 1967. While we necessarily begin our analysis in the context of the majority opinion in *Bellas Hess*, we are mindful that prior cases cannot be read in a vacuum, but must be considered in light of their relevant facts and historical context. See *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) (Scalia, J., concurring in part and dissenting in part). Similarly, appellate review in general is not to be conducted in a vacuum. *Cullen v. Williams County*, 446 N.W.2d 250 (N.D. 1989). Appellate judges bring to each case their common sense, ordinary experience, and observation of human affairs. *Cf. Nebraska Press Association v. Stuart*, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976); *Salve Regina College v. Russell*, ___ U.S. ___, 111 S.Ct. 1217, ___ L.Ed.2d ___ (1991) (Rehnquist, C.J., dissenting); *State v. Olmstead*, 261 N.W.2d 880 (N.D.), *cert. denied*, 436 U.S. 918, 98 S.Ct. 2264, 56 L.Ed.2d 759 (1978).

Quill in effect asks us to accept the notion that the United States Supreme Court will abandon its common sense and experience at the courthouse door and ignore the tremendous social, economic, commercial, and legal innovations since 1967, and blindly apply an obsolescent precedent. We have in the past been chided by the United States Supreme Court for doing just that, and in failing to detect changes in legal course by that Court. See *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 94 S.Ct 407, 38 L.Ed.2d 379 (1973), *reversing* 202 N.W.2d 140 (N.D. 1972). See also, *Snyder's Drug Stores, Inc. v. North Dakota State Board of Pharmacy*, 219 N.W.2d 140 (N.D. 1974) (on remand).[3] We are guided by the maxim that "[w]hen the reason of a rule ceases so should the rule itself." Section 31-11-05(1), N.D.C.C. We have little doubt that maxim has wider application than our state boundaries. As noted by Justice Cardozo, "[t]here should be greater readiness to abandon an untenable position when the rule to be discarded may not reasonably be supposed to have determined the conduct of the litigants, and particularly when in its origin it was the product of institutions or conditions which have gained a new significance or development with the progress of the years." Cardozo, The Nature of the Judicial Process 151 (1921) [*quoted in Kitto v. Minot Park District*, 224 N.W.2d 795, 803 (N.D. 1974)].

[3] The United States Supreme Court stated that its opinion in an earlier case, upon which we had relied in holding unconstitutional a state statute, was "a derelict in the stream of the law." *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, *supra*, 414 U.S. at 167, 94 S.Ct. at 414, 38 L.Ed.2d. at 387. Significantly, in overruling its prior case, the Court quoted with approval the dissent in the earlier case. See *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, *supra*; see also, *Snyder's Drug Stores, Inc. v. North Dakota State Board of Pharmacy*, *supra*, 219 N.W.2d at 146.

C

The economic, social, and commercial landscape upon which *Bellas Hess* was premised no longer exists, save perhaps in the fertile imaginations of attorneys representing mail order interests. In the quarter-century which has passed in the interim, "mail order" has grown from a relatively inconsequential market niche into a goliath now more accurately delineated as "direct marketing." The burgeoning technological advances of the 1970's and 1980's have created revolutionary communications abilities and marketing methods which were undreamed of in 1967.[4]

Rather than a few full-line mail order retailers essentially offering a "department store by mail," mail order

[4] Anyone with a telephone, television, or mailbox can attest to these modern marketing miracles. When you turn on your television set to one of the myriad of available cable channels, you are likely to see numerous commercials for products, "not available in any store," which must be ordered "before midnight tonight" by dialing the toll-free "800" number on the screen. If the commercials are not enough, you may find yourself watching a thirty-minute "infomercial" hawking items as diverse as cosmetics, car wax, weight loss plans, or cooking utensils. If you are a truly modern consumer, you may turn to one of the 24-hour home shopping channels, available on most cable systems, for a continuous opportunity to buy in the comfort of your living room.

The salesperson who calls on the telephone is likely to be armed with significant background information, including your age, occupation, ages of your children, and your hobbies and buying habits, so that sales calls can be specifically targeted to those customers statistically inclined to purchase certain products. Or, if you prefer, through the wonders of technology you can browse through a computer "catalog," check availability and price of the item you want, and place your order directly through the seller's computer across the country.

The revolution in direct marketing techniques and technology is recounted in Stone, *Direct Marketing: Then and Now, Direct Marketing*, May 1988, p. 38.

is today marked by literally thousands of specialized catalogs targeted at specific groups of consumers. Technology has triggered this transformation, with computerized database marketing allowing mailings directed to specific demographical groups. In fact, the sale and rental of lists of names of prior or potential mail order purchasers has itself become a three-billion-dollar business.[5] Technology has also changed the method of receiving orders, with the increased efficiency of toll-free telephone lines, fax orders, and direct computer ordering replacing the less-immediate "mail" order, and advances in the parcel delivery industry allow a wide variety of options, including overnight delivery.

Perhaps the greatest change in mail order since 1967 has been in terms of sheer volume. Gone are the days of the Spring and Fall Sears catalog being the definition of mail order. It is estimated that in 1990 13.6 *billion* catalogs were mailed to consumers in the United States, an increase of 7.8 billion in ten years. Over 54 percent of Americans—98 million—made a mail order purchase, an increase of 40 million since 1983.[6] Mail order sales, in the neighborhood of $2.4 billion in 1967 [*see Bellas Hess, supra*, (Fortas, J., dissenting)], reached the staggering figure of $183.3 billion in 1989.[7] By the mid-1980's, mail order accounted for more than 15 percent of total sales nationally. See, e.g., 43 Cong. Q. 2571 (Dec. 7, 1985); Hartman, *Collection of the Use Tax on Out-of-State Mail-Order Sales*, 39 Vand.L.Rev. 993 (1986).

[5] *Time*, November 26, 1990, at p. 66.

[6] These figures are from the Direct Marketing Association, as reported in their special advertising section in the March 14, 1991, edition of USA Today, at pp. 10A-11A.

[7] See *Time*, November 26, 1990, at P. 63; *Direct Marketing*, July 1990, at p. 30.

While in 1967 it may have generally been necessary to rely upon in-state sales personnel and inventory to successfully market a product, technology has changed the rules of the game. Today a direct marketer can communicate with his customers across the country through toll-free incoming telephone lines, national WATS telephone service, fax machines, telex, or direct computer communication just as effectively, and more efficiently, than if he were calling personally on each customer. Clearly the direct marketing of the 1990's bears little resemblance to the mail order of the 1960's.

D

Just as the changes in marketing techniques have affected the economic and commercial landscape since *Bellas Hess*, so too has the legal landscape been altered in that quarter-century.[8] The Supreme Court's expansion of state authority to tax interstate commerce, as well as its broadening of other areas of Due Process and Commerce Clause analysis, leads us to conclude that the foundational basis of *Bellas Hess* has been eroded and that the Supreme Court would so conclude.

Perhaps the most striking shift in the Court's position on taxation of interstate commerce occurred in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977), in which the Court overruled years

[8] As the Supreme Court noted in *Mobil Oil Corp. v. Commissioner of Taxes of Vermont*, 445 U.S. 425, 443, 100 S.Ct. 1223, 1234, 63 L.Ed.2d 510, 524 (1980), "[t]he effect of the Commerce Clause on state taxation of interstate commerce . . . appears to be undergoing a revival of sorts" and "this Court has addressed the issue and has attempted to clarify the apparently conflicting precedents it has spawned."

of precedent and developed a four-prong test to assess Commerce Clause challenges to state taxation of interstate commerce. Prior to that time, Commerce Clause analysis was controlled by the free trade view, as enunciated in *Spector Motor Service v. O'Connor*, 340 U.S. 602, 71 S.Ct. 508, 95 L.Ed. 573 (1951), that direct taxation of interstate commerce was *per se* unconstitutional. See P. Hartman, Federal Limitations on State and Local Taxation §§ 2:16, 2:17 (1981) [hereafter "Hartman, Federal Limitations"]; Recent Developments, *D.H. Holmes Co. v. McNamara: Use Tax on Catalogs Does Not Violate Commerce Clause*, 63 Tul. L. Rev. 407 (1988). Thus, at the time of *Bellas Hess*, Commerce Clause analysis often focused upon whether the challenged tax was levied upon the privilege of doing interstate business or upon some other less-direct incidence of interstate commerce.

The *Spector* doctrine was widely criticized as dependent upon illusory distinctions, legislative labelling, and insubstantial and pointless formalism. Hartman, Federal Limitations, *supra*, at §§ 2:16-2:17; see also, *Complete Auto*, *supra*; McCray, *Commerce Clause Sanctions Against Taxation on Mail Order Sales: A Re-Evaluation*, 17 Urb. Law. 529 (1985); Recent Developments, 63 Tul. L. Rev. 407, *supra*. The Court, noting that the *Spector* rule "has no relationship to economic realities" and "stands only as a trap for the unwary draftsman," *Complete Auto*, *supra*, 430 U.S. at 279, 97 S.Ct. at 1079, 51 L.Ed.2d at 331, specifically overruled *Spector* and announced a four-prong test for evaluating Commerce Clause challenges to state taxation. Under the *Complete Auto* formulation, a tax does not violate the Commerce Clause if it (1) is applied to an activity with a substantial nexus with the taxing state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services provided by the state. *Complete Auto*, *supra*; see also, *Trinova Corp. v. Michigan Department of Treasury*, ___ U.S. ___, 111 S.Ct. 818, 112 L.Ed.2d 884 (1991); *D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 108 S.Ct. 1619, 100 L.Ed.2d 21 (1988).

One month after deciding *Complete Auto*, the Court expanded the authority of the states to require out-of-state sellers to collect and remit a use tax in *National Geographic Society v. California Board of Equalization*, 430 U.S. 551, 97 S.Ct. 1386, 51 L.Ed.2d 631 (1977). National Geographic sold maps, atlases, globes, and books by mail order to California residents. National Geographic had two offices in California which solicited advertising for its magazine, but which performed no activities related to the mail order sales. National Geographic challenged California's authority to require collection of use tax on its mail order sales, alleging that there was insufficient nexus between its mail order sales and California.

In prior cases, including *Complete Auto*, the Court had phrased the nexus requirement in terms of the relationship between the taxing state and the *activity* to be taxed. In *National Geographic*, however, the Court expanded the concept of nexus in use tax cases to situations where the out-of-state *seller* has the requisite nexus with the taxing state. Thus, the Court focused upon the benefits and services provided by the state to National Geographic's two advertising offices to support collection of use tax upon its unrelated mail order sales into the state.

In so holding, the Court stressed the distinction between the lesser burdens placed upon the seller by a use tax, which is ultimately borne by the in-state purchaser, and a more direct tax upon the seller:

> "Other fairly apportioned, nondiscriminatory direct taxes have also been sustained when the taxes have been shown to be fairly related to the services provided the out-of-state seller by the taxing State. . . .

> "The case for the validity of the imposition upon the out-of-state seller enjoying such services of a duty to collect a use tax is even stronger. . . . The out-of-state seller runs no risk of double taxation. The consumer's identification as a resident of the taxing state is self-evident. . . . The out-of-state seller becomes liable for the tax only by failing or refusing to collect the tax from that resident consumer. Thus, the sole burden imposed upon the out-of-state seller by statutes like §§ 6203 and 6204 is the administrative one of collecting it." *National Geographic, supra*, 430 U.S. at 558, 97 S.Ct. at 1391, 51 L.Ed.2d at 638 (citations omitted).

Thus, the Court not only expanded the concept of nexus, but it also recognized the purely administrative nature of the collection duty in use tax cases and indicated that a lesser showing of nexus may suffice in such cases.

More recently, in a case presenting an interesting twist to the usual use tax situation, the Court upheld imposition of use taxes upon catalogs themselves in *D.H. Holmes Co. v. McNamara, supra*. Holmes, which had thirteen stores in Louisiana, had its catalogs printed out-of-state and mailed from those locations directly to Louisiana customers. The catalogs promoted items available for sale in the local stores, and also could be used to order items by mail. Louisiana sought to collect from Holmes use taxes based upon the value of the catalogs, asserting that they were "used" by Holmes within the state.

The Court applied the *Complete Auto* test and upheld imposition of the tax. Most importantly for our purposes, the Court distinguished *Bellas Hess* in holding that Holmes had sufficient nexus with Louisiana. Although, as the Court noted, there was " 'nexus' aplenty" present, *Holmes, supra*, 486 U.S. at 33, 108 S.Ct. at 1624, 100 L.Ed.2d at 29, what is particularly noteworthy is the language employed by

the Court to distinguish *Bellas Hess*. Notwithstanding that Holmes was incorporated in Louisiana, had its registered office there, and had thirteen stores with 5,000 employees in the state, the first factor noted by the Court in distinguishing *Bellas Hess* was "Holmes' significant *economic* presence in Louisiana." *Holmes, supra*, 486 U.S. at 33, 108 S.Ct. at 1624, 100 L.Ed.2d at 29 (emphasis added). In a case involving obvious physical presence, we find it significant that the Court chose to stress economic presence, the phraseology of the *Bellas Hess* dissent.

The Court has also discussed the broadening concept of nexus in cases involving constitutional challenges to other taxes upon interstate commerce. For example, in *Standard Pressed Steel Co. v. Washington Department of Revenue*, 419 U.S. 560, 95 S.Ct. 706, 42 L.Ed.2d 719 (1975), a manufacturer of industrial and aerospace fasteners challenged imposition of Washington's business and occupation tax levied upon its unapportioned gross receipts from sales in the state. Standard Pressed Steel's sole connection with the state, other than its interstate sales, was one employee, working from his home in the state, who serviced the company's one large account in the state, the Boeing Company. This employee was a consultant only; he did not take orders on behalf of Standard.

Rather than focusing upon Standard's minimal physical contact with the state through a single employee, and the concomitant minimal benefits and services provided to the company, the Court instead emphasized the connection between the employee's activities and the establishment and continuance of sales to Boeing. In other words, instead of relying upon a bright-line demarcation based upon Standard's physical presence in the taxing state and the receipt of benefits and services, the Court in finding nexus stressed that the employee "made possible the realization

and continuance of valuable contractual relations between [Standard] and Boeing" [*Standard Pressed Steel*, *supra*, 419 U.S. at 562, 95 S.Ct. 708, 42 L.Ed.2d at 722], and that the employee's "services were substantial 'with relation to the establishment and maintenance of sales, upon which the tax was measured.' " *Standard Pressed Steel*, *supra*, 419 U.S. at 563, 95 S.Ct. at 709, 42 L.Ed.2d at 723 (*quoting General Motors Corp. v. Washington*, 377 U.S. 436, 447, 84 S.Ct. 1564, 1571, 12 L.Ed.2d 430, 439 (1964), *overruled on other grounds*, *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, 483 U.S. 232, 107 S.Ct. 2810, 97 L.Ed. 2d 199 (1987)). In so holding, the Court stated that Standard's asserted lack of nexus "verges on the frivolous." *Standard Pressed Steel*, *supra*, 419 U.S. at 562, 95 S.Ct. at 708, 42 L.Ed.2d at 722.

In *Tyler Pipe*, *supra*, the Court was again presented with a nexus challenge to the Washington business and occupation tax. Tyler Pipe had one representative soliciting business in state, but, in contrast to *Standard Pressed Steel*, *supra*, Tyler Pipe's salesman was an independent contractor, not an employee. The Court, relying upon *Scripto, Inc. v. Carson*, 362 U.S. 207, 80 S.Ct. 619, 4 L.Ed.2d 660 (1960), held that the salesman's status as an independent contractor was without constitutional significance. Concluding that the activities of the independent contractor within the state created a sufficient nexus to support imposition of the tax, the Court agreed with the Washington Supreme Court that " 'the crucial factor governing nexus is whether the activities performed in this state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in this state for the sales.' " *Tyler Pipe*, *supra*, 483 U.S. at 250, 107 S.Ct. at 2821, 97 L.Ed.2d at 215-216 (*quoting Tyler Pipe Industries, Inc. v. State*, 105 Wash.2d

318, 323, 715 P.2d 123, 126 (1986)). Thus, in both *Standard Pressed Steel* and *Tyler Pipe*, the Court did not employ a bright-line physical presence test, but instead focused upon the relationship between the out-of-state seller's contacts with the state and its establishment and maintenance of sales within the state.

While the Court has been expanding states' authority to tax interstate commerce, it has also significantly broadened the closely related Due Process analysis in personal jurisdiction cases. In *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472-473, 105 S.Ct. 2174, 2182, 85 L.Ed.2d 528, 540-541 (1985), the Court summarized some examples of conduct which will satisfy the minimum contacts requirement and justify assertion of personal jurisdiction over an out-of-state seller:

> "Where a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, this 'fair warning' requirement is satisfied if the defendant has 'purposefully directed' his activities at residents of the forum. . . and the litigation results from alleged injuries that 'arise out of or relate to' those activities. . . . Thus '[t]he forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State' and those products subsequently injure forum consumers. . . . Similarly, a publisher who distributes magazines in a distant State may fairly be held accountable in that forum for damages resulting there from an allegedly defamatory story. . . . And with respect to interstate contractual obligations, we have emphasized that parties who 'reach out beyond one state and create continuing relationships and obligations with citizens of another state' are subject to regulation and sanctions in the other State for the consequences of their activities. . . ." (Citations omitted.)

It is clear that Quill has "purposefully directed" its activities at North Dakota residents, has "reach[ed] out . . . and create[d] continuing relationships and obligations with citizens" of this State, and has gone beyond placing its products into a general stream of commerce—it has sold and delivered its products directly to North Dakota consumers. It is therefore clear that Quill could, consistent with Due Process, be brought into a North Dakota court to litigate claims arising from those activities.

More significant, however, is the Court's clear recognition that technological advances have made physical presence within the jurisdiction meaningless in modern commerce:

> "Jurisdiction in these circumstances may not be avoided merely because the defendant did not *physically* enter the forum State. Although territorial presence frequently will enhance a potential defendant's affiliation with a State and reinforce the reasonable foreseeability of suit there, it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted. So long as a commercial actor's efforts are 'purposefully directed' toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there." *Burger King, supra*, 471 U.S. at 476, 105 S.Ct. at 2184, 85 L.Ed.2d at 543.

The Court also recognized the unfairness which would result if out-of-state sellers were allowed to wholly escape responsibility for the consequences of their actions in other states:

> "Moreover, where individuals 'purposefully derive benefit' from their interstate activities . . . it may well be unfair to allow them to escape having to account in other States for consequences that arise

> proximately from such activities; the Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed. And because 'modern transportation and communications have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity,' it usually will not be unfair to subject him to the burdens of litigating in another forum for disputes relating to such activity. . . ." *Burger King, supra*, 471 U.S. at 473-474, 105 S.Ct. at 2183, 85 L.Ed.2d at 541 (citations omitted).

E

In light of these wholesale changes in the social, economic, commercial, and legal arenas, we are required to apply *Bellas Hess* in a contemporary context as we believe the Supreme Court would apply that decision.

The Supreme Court has recently recognized that sweeping technological changes may require corresponding changes in legal doctrine. In *Goldberg v. Sweet*, 488 U.S. 252, 109 S.Ct. 582, 102 L.Ed.2d 607 (1989), Illinois' telecommunications excise tax was challenged on Commerce Clause grounds. After a lengthy discussion of the "explosion in new telecommunications technologies" [*Goldberg, supra*, 488 U.S. at 255, 109 S.Ct. at 585, 102 L.Ed.2d at 613], the Court concluded that "Illinois' method of taxation is a realistic legislative solution to the technology of the present-day telecommunications industry." *Goldberg, supra*, 488 U.S. at 265, 109 S.Ct. at 591, 102 L.Ed.2d at 619. Commenting on prior cases striking down similar state taxes on interstate telecommunications, the Court simply noted that "[t]hese cases considered a telecommunications technology only distantly related to modern telecommunications technology and were decided in a pre-*Complete*

Auto era when this Court held the view that interstate commerce itself could not be taxed." *Goldberg, supra*, 488 U.S. at 265 n.16, 109 S.Ct. at 591 n.16, 102 L.Ed.2d at 619 n.16.

Similarly, the Court in *Burger King, supra*, 471 U.S. at 476, 105 S.Ct. at 2184, 85 L.Ed.2d at 543, noted the technological changes which have affected modern commerce: "[I]t is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted." In *Goldberg* and *Burger King* the Court has recognized that legal theory must be flexible to account for societal changes, and that the vast technological explosion of recent years often requires rethinking of previous doctrine. We therefore are instructed to be cognizant of the vast differences between the mail order of the 1960's and the direct marketing of the 1990's when applying *Bellas Hess* in this case. In addition, the *Bellas Hess* majority specifically characterized the transactions there as being carried out only by mail or common carrier. Very little of the direct marketing of today is limited to mail or common carrier, and the facts of this case clearly demonstrate that Quill's business extended far beyond those limited circumstances.

We also recognize the Court's extensive shift in focus in interstate commerce tax cases. The Court has wholly rewritten the underlying theory in such cases and formulated a new test to measure Commerce Clause challenges. See *Complete Auto, supra*. In *National Geographic, supra*, the Court stressed the administrative nature of the use tax collection requirement and held that a lower threshold of nexus may suffice in use tax cases than in attempts to collect a tax directly from the out-of-state

seller. In *Holmes, supra*, the Court applied the *Complete Auto* test to judge a use tax and noted the seller's significant economic presence within the taxing state to find sufficient nexus and distinguish *Bellas Hess*.

Complete Auto and subsequent interstate commerce tax cases have been viewed as an abandonment of the Court's previous formalistic approach in favor of a "more realistic functional calculus" [L. Tribe, American Constitutional Law § 6-15, at 441 (2d ed. 1988)], "grounded in practicality and economic reality" [Recent Developments, 63 Tul. L. Rev. 407, *supra*]. See also, *Trinova Corp. v. Michigan Department of Treasury, supra*; *Mobil Oil Corp. v. Commissioner of Taxes of Vermont*, 445 U.S. 425, 100 S.Ct. 1223, 63 L.Ed.2d 510 (1980). The Court's opinions in *Standard Pressed Steel* and *Tyler Pipe* also demonstrate a greater emphasis upon the economic consequences and realities of the transactions at issue rather than a bright-line physical presence test. Although in each of these cases there was some degree of physical presence within the taxing state, the Court's analysis evinces a retreat from the formalistic constrictions of a stringent physical presence test in favor of a more flexible substantive approach. Accordingly, we believe that a contemporary view of nexus is not dependent upon rigid benchmarks to be applied across the board, but requires a review of the totality of the circumstances, on a case-by-case basis, with special emphasis upon the economic realities presented. See Hartman, *Collection of the Use Tax, supra*. This approach best comports with the Court's current Due Process and Commerce Clause analysis.

We are particularly mindful of the illogical results which can flow from a strict requirement of physical presence within the taxing state in light of the contemporary legal and commercial landscape. For example, a small out-of-state seller with minimal sales in the taxing state solicited

through an independent-contractor traveling salesperson would have sufficient nexus to support a duty to collect and remit the use tax [see *Tyler Pipe*, *supra*, and *Scripto*, *supra*], yet a mail order leviathan with millions of dollars of annual sales solicited by innumerable catalogs and flyers, and consummated by telephone, fax, telex, or direct computer contact, would be deemed unreachable because it has insufficient nexus with the state. Such a result merely propounds the legal fiction that the fire and police protection provided to one salesperson hawking wares in the state provides a more significant "benefit" than does creating and maintaining a social and commercial climate that enables the out-of-state seller to exploit the state's consumer market to the tune of millions of dollars. See, e.g., Hartman, *Collection of the Use Tax*, *supra*; Simet, *The Concept of "Nexus" and State Use and Unapportioned Gross Receipts Taxes*, 73 Nw.U.L.Rev. 112 (1978).

The Court's current personal jurisdiction analysis also strongly suggests a retrenchment from physical presence as a benchmark in Due Process analysis. A corporation that merely delivers its product into the stream of commerce with the expectation that it will be purchased by a consumer in another state may be subjected to litigation there [*Burger King*, *supra*], yet Quill asserts that subjecting it to collection of the use tax, in spite of its continuous, intentional, and massive exploitation of this State's consumer market, would be violative of Due Process. It would be illogical indeed to hold that Quill, which could clearly be haled into a North Dakota court if one of its products injured a North Dakota consumer, could not be saddled with the purely *administrative* burden of collecting a use tax. See *National Geographic*, *supra*.

Finally, we note the irony in Quill's reliance upon the Due Process Clause and the Commerce Clause in seeking

to maintain a tax-free mail order haven and thereby retain an economic advantage over its local competitors.[9] The touchstone of Due Process is fundamental fairness. *Burger King*, *supra*; *Bearden v. Georgia*, 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983). The "very object" of the Commerce Clause is protection of interstate commerce from discriminatory local practices. *Welton v. Missouri*, 91 U.S. (1 Otto) 275, 280, 23 L.Ed. 347, 349 (1875); see also, L. Tribe, American Constitutional Law, *supra*, at § 6-17. However, rather than employing the Commerce Clause as a shield against unfair, discriminatory practices favoring local merchants, Quill now raises the Commerce Clause as a sword to carve out a tax-free mail order niche and gain an unfair competitive advantage over local retailers. It would be odd indeed if we were to hold that out-of-state sellers may invoke the Due Process Clause to promote a fundamentally unfair economic advantage over local sellers.

We conclude that Quill's asserted lack of physical presence is not fatal to the State's attempt to require Quill to collect and remit use tax on its sales into North Dakota. Applying *Bellas Hess* in light of subsequent case law, and within the context of contemporary society and commercial practice, we conclude that the concept of nexus encompasses more than mere physical presence within the state, and that the determination of nexus should take into consideration all connections between the out-of-state seller and the state, all benefits and opportunities pro-

[9] Empirical studies have demonstrated the effect of the presence or absence of sales or use taxes upon consumer purchasing behavior. See, e.g., Mowen, Wiener & Young, *Consumer Store Choice and Sales Taxes: Retailing, Public Policy, and Theoretical Implications*, 66 Journal of Retailing 222 (1990).

vided by the state, and should stress economic realities rather than artificial benchmarks.

F

The Court in *Bellas Hess* also focused upon the "virtual welter of complicated obligations" which would be imposed upon mail order sellers if they were required to collect and remit use taxes in every state. *Bellas Hess*, *supra*, 386 U.S. at 760, 87 S.Ct. at 1393, 18 L.Ed.2d at 510. This basis for the Court's holding has also been seriously eroded by the technological advances of the past quarter-century. The almost universal usage of automated accounting systems, and corresponding advancements in computer technology, have greatly alleviated the administrative burdens created by such a collection duty. See, e.g., Hartman, Federal Limitations, *supra*, at § 10:8; Hartman, *Collection of the Use Tax*, *supra*; McCray, *Overturning Bellas Hess: Due Process Considerations*, 1985 B.Y.U.L. Rev. 265 (1985).

In addition, in subsequent use tax cases the Supreme Court has all but ignored the burdensome nature of imposition of the collection duty. Furthermore, the Supreme Court has never struck down a use tax solely because of the administrative burdens placed upon the out-of-state seller if sufficient nexus has first been found.

Finally, we note that the seller is allowed to retain a percentage of the use taxes collected as reimbursement for expenses incurred in collecting and remitting the tax. Section 57-40.2-07.1, N.D.C.C. This further alleviates any burdens created by requiring Quill to collect and remit the tax.

We conclude that the burdensome nature of the use tax collection duty does not prohibit imposition of this duty upon Quill in this case.[10]

III

We now turn to the specifics of Quill's constitutional challenge in this case.

All legislative enactments are imbued with a strong presumption of constitutionality, and this presumption is conclusive unless it is clearly shown that the statute contravenes the state or federal constitution. *North Dakota Council of School Administrators v. Sinner*, 458 N.W.2d 280 (N.D. 1990). The party challenging the constitutionality of a statute has the burden of proving its constitutional infirmity. *Best Products Co., Inc. v. Spaeth*, 461 N.W.2d 91 (N.D. 1990); *Neuman Signs, Inc. v. Hjelle*, 268 N.W.2d 741 (N.D. 1978), *appeal dismissed*, 440 U.S. 901, 99 S.Ct. 1205, 59 L.Ed.2d 449 (1979). Any doubt must be resolved in favor of the constitutionality of the statute. *North Dakota Council of School Administrators*, *supra*.

Commerce Clause challenges to use taxes are reviewed under the *Complete Auto* test. See Holmes, *supra*. The only prong of the *Complete Auto* test raised by Quill is the nexus requirement.[11] This first prong is closely related

[10] This argument is also undermined in this case by Quill's extensive computer expertise. Quill sells computers and related hardware, and has developed its own computer software to allow customers to contact Quill directly on their own computers to place orders, check price and availability, and communicate via an electronic bulletin board.

[11] Quill did not, in fact, place its arguments within the context of the *Complete Auto* test, which clearly governs review of a Commerce Clause challenge to a use tax. See *Holmes*, *supra*.

to the fourth prong of *Complete Auto*, which requires that the tax be fairly related to the benefits, opportunities, or services provided by the taxing state. Nexus has historically been analyzed as whether the state has provided some protection, opportunity, or benefit for which it can expect a return. See, e.g., *Bellas Hess*, *supra*; *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 61 S.Ct. 246, 85 L.Ed. 267 (1940). Thus, we necessarily consider these two related prongs in determining the constitutionality of the use tax as applied to Quill.[12]

The Supreme Court has clarified that the Due Process requirement of a "minimal connection" to establish nexus is encompassed within the *Complete Auto* test. *Trinova Corp. v. Michigan Department of Treasury*, *supra*; *Amerada Hess Corp. v. Director, Division of Taxation*, 490 U.S. 66, 109 S.Ct. 1617, 104 L.Ed.2d 58 (1989). Thus, if the tax satisfies the nexus requirement of the *Complete Auto* test, it a fortiori satisfies the Due Process nexus requirement. *Amerada Hess*, *supra*.

As discussed in previous sections of this opinion, current Due Process and Commerce Clause analyses indicate that lack of physical presence within the taxing state is not the sole determinative factor in analyzing nexus questions. Rather, we must review all of Quill's contacts with the State to determine whether Quill has a sufficient nexus to satisfy constitutional standards.

Quill's activities directed toward North Dakota consumers clearly establish a substantial "presence" within the

[12] No assertion has been made that the use tax is not fairly apportioned or that it discriminates against interstate commerce. Thus, the second and third prongs of the *Complete Auto* test need not be addressed.

State. To iterate Quill's activities, it has 3,500 active customers in North Dakota, and its annual sales of nearly $1,000,000 make it the sixth largest seller of office supplies in the State. It annually mails over 60 different catalogs and flyers to its North Dakota customers, accounting for 230,000 separate pieces of mail. Quill also has a "help line" for consumers to call if they have questions or problems with merchandise ordered from Quill, and specialized service representatives are available to assist with custom printing orders or to answer questions about computers available from Quill. Quill has availed itself of modern technology to engage in an extensive, continuous, and intentional solicitation and exploitation of the State's consumer market and has thereby established an ubiquitous presence in the State.

Quill has a further connection with North Dakota which supports a finding of nexus. Quill licenses to some of its North Dakota customers a computer software program, Quill Service Link ["QSL"], which permits customers direct computer access to Quill's computer. This allows customers to check Quill's available inventory, confirm current price, and order merchandise directly by computer. Customers with QSL can also communicate with Quill and other customers through an electronic "bulletin board."

Quill retains all rights in QSL through the license agreement. Quill also retains the right to terminate the license "forthwith without prior notice and without cause," and upon termination the customer must "immediately return Software, and copies thereof and the user documentation to Quill." The explicit terms of the licensing agreement belie Quill's assertion that it merely sells the software—lock, stock, and barrel—to the customer. Through its licensing agreement, Quill clearly retains rights to property

situated in North Dakota,[13] providing further nexus with the State. See *Matter of Heftel Broadcasting Honolulu,*

[13] The State argues that Quill owns other property in North Dakota, providing a further showing of nexus and benefits. The State asserts that Quill makes sales on approval in North Dakota and retains title to the goods until the merchandise is accepted or rejected by the buyer. Thus, the State argues, Quill owns property within the State which receives fire and police protection, as well as other benefits.

Quill's catalog makes the following offer to customers:

> "Use any product from Quill in your office FREE for 30 days. During that time, try it, inspect it, use it . . . just to be sure you're satisfied with the product. You have no reason to pay us and can return it during that period for any reason . . . no questions asked . . . and we'll give you a full credit against your invoice."

In addition, customers may, at any time within 90 days of purchase, return any item for a full refund if not completely satisfied.

Section 41-02-43(1), N.D.C.C, [U.C.C. §2-326] provides:

> "*Sale on approval and sale or return—Consignment sales and right of creditors.*
>
> "1. Unless otherwise agreed, if delivered goods may be returned by the buyer even though they conform to the contract, the transaction is:
>
> "a. A 'sale on approval' if the goods are delivered primarily for use.
>
> "b. A 'sale or return' if the goods are delivered primarily for resale."

If a transaction constitutes a sale on approval under Section 41-02-43(1), title to the goods does not pass until the buyer accepts them. Section 41-02-44(1)(a), N.D.C.C.

Quill asserts, however, that its sales are not "sales on approval" because it does not offer an "unconditional guarantee of refund" and because in some cases the buyer must pay the return shipping costs.

The district court summarily rejected the State's argument and ruled that, as a matter of law, title to the merchandise passed to the purchaser immediately at the time of shipping. Although the court's ruling was wholly conclusory and failed to fully take

(Footnote continued on following page)

Inc., 57 Hawaii 175, 554 P.2d 242 (1976), *cert. denied*, 429 U.S. 1073, 97 S.Ct. 811, 50 L.Ed.2d 791 (1977).

Quill asserts, however, that the State has provided no protections, benefits, or opportunities which justify imposition of the duty to collect and remit the use tax. Quill would have us limit our consideration to solely property-protection functions of the State, such as fire and police protection, in determining whether the State has given something for which it may ask a return. However, just as the Court's cases of the past 25 years have broadened the concept of nexus, so too have recent cases suggested an expanding view of the benefits which may support State taxation. See, e.g., *Goldberg*, *supra*; *Holmes*, *supra*. Such intangible factors as the benefit of a trained work force and the "other advantages" of a civilized society have been cited by the Court to support imposition of taxes. See, e.g., *Amerada Hess*, *supra*; *Goldberg*, *supra*; *Holmes*, *supra*. The court, in upholding a tax on an out-of-state seller, has also noted Justice Holmes' declaration that "government is the prerequisite for the fruits of civilization for which. . . . we pay taxes," and that, accordingly, it was the state that had made the seller's earnings possible. *Wisconsin v. J.C. Penney Co.*, *supra*, 311 U.S. at 446, 61 S.Ct. at 250, 85 L.Ed. at 271.

Various commentators have noted that the benefits and opportunities considered in determining nexus should include economic benefits and opportunities conferred by the

[13] *continued*

into account the underlying factual issues necessary to a determination of the legal issues, we find it unnecessary to resolve this issue at this time. Because we have held that sufficient nexus exists to support imposition of the duty to collect and remit the use tax, we need not determine if Quill has additional nexus with the State through retention of title to goods sold on approval.

State. See, e.g., Hartman, Federal Limitations, *supra*, at §§ 2:7 and 10:8; Hartman, *Collection of the Use Tax*, *supra*; McCray, *Overturning Bellas Hess*, *supra*; Simet, *The Concept of "Nexus,"*, *supra*; Note, *Imposition of the Duty to Collect State Use Taxes: Constitutional Prohibitions Are No Longer Valid in Mail Order Sales*, 32 S.D.L.Rev. 93 (1986). The underlying rationale is that these benefits and opportunities bear a more direct relationship to the generation of sales for the mail order seller than the comparatively inconsequential benefits and protections provided for a seller's property or personnei within the State. Whether or not an out-of-state seller has a physical presence within the State, it is the in-state infrastructure which creates and maintains the consumer market and economic climate that fosters demand for the seller's goods and services.

The theory has been summarized by Professor Emeritus Hartman:

> "An unrealistic facet of the *Bellas Hess* doctrine is that the Court presumably thought that a few 'warm bodies' in the taxing state—either operating from an office, or traipsing around hawking their wares without any in-state office—constitute a more satisfactory nexus with a state, for constitutional purposes, than other more substantial and meaningful connections. Benefits from the taxing state that are unrelated to physical contact with the state may be of vastly greater significance than those derived from the presence of a whole swarm of the out-of-state seller's agents soliciting business. Practically speaking, some form of physical presence within the state in furtherance of a business purpose is not essential to the existence of a meaningful nexus with the state.
> . . .
>
> "For use tax collection purposes, the connection or nexus between the taxing state and out-of-state mail-order sellers should be an economic, rather than physical, relationship. When an out-of-state mail-order seller, for the purpose of realizing a profit, takes advantage of the taxing state's economic climate and milieu through systematic, continuous, and large-scale solicitation of that state's consumer market, that activity should constitute a connection or nexus sufficient to require the out-of-state seller to collect the use tax. When the state provides a substantial economic benefit to the production of income for the out-of-state seller, the taxing state should be able to demand a tithe from the seller." Hartman, *Collection of the Use Tax*, *supra*, 39 Vand.L.Rev. at 1013-1014.

Other benefits provided by the state to the mail order seller have also been noted:

> "[I]f the buyer is a typical mail order consumer who remains passive in a transaction and does not enter the seller's state, actively initiate contact, negotiate substantial terms of a transaction, or undertake ongoing business relationships with the seller, he is not deemed subject to the jurisdiction of the seller's state in a breach of contract action. Sellers are also prohibited from bringing suits in their own states against out-of-state buyers because of a Federal Trade Commission order enjoining such suits as unfair trade practices. A mail order seller may thus enforce his legal rights against a delinquent or fraudulent buyer *only* in the courts of the buyer's state. Thus it is the buyer's state that protects the revenues of the out-of-state seller.
>
> "The buyer's state also benefits the seller by assuring him an orderly market through consumer protection and usury laws on mail order transactions. Such laws create consumer confidence and eliminate unscrupulous sellers from the market. Consumer confidence is critically important to sales which cross state lines. In mail order transactions, consumers must rely heavily on state enforcement mechanisms to rectify

wrongs and enforce rights." McCray, *Overturning Bellas Hess*, *supra*, 1985 B.Y.U.L.Rev. at 285.

An additional indispensable service is provided by the State: it disposes of the 24 tons of solid waste contributed annually to North Dakota landfills by Quill's catalogs and flyers. Although a similar argument was recently rejected in *SFA Folio Collections, Inc. v. Bannon*, 217 Conn. 220, 585 A.2d 666 (1991), we do not find the reasoning of that case persuasive. The court's discussion of the issue, in total, states:

> "The commissioner's argument, that Folio derives benefit from Connecticut by virtue of the state disposing of the catalogs as paper trash is likewise without merit. Because the catalogs are the property of the Connecticut residents, it is axiomatic that it is the resident who is deriving the benefit from the state and who must contribute to the cost of the disposal." *SFA Folio Collections, Inc.*, *supra*. 585 A.2d at 671 n.6.

The court's rationale is far too simplistic. To suggest that the seller derives no benefit from the State's waste-collection efforts because theoretically the catalogs become the consumer's "property" when they reach the mailbox ignores the realities of the situation, and fails to take into account that most mail order solicitations have not been requested, and may in fact be unwanted, by the consumer.[14] It is the mail order seller who derives the most direct benefit from its own mailings, and it therefore is not unreasonable to assume that the seller derives some measure of benefit from the entity that is ultimately responsible for disposing of the veritable mountain of trash created thereby.[15] Certainly the benefit is as direct and consequential as the benefits provided by fire and police protection afforded to an independent contractor solicitor within the state, which have been found sufficient to uphold taxation. See *Tyler Pipe*, *supra*.

[14] It is estimated that 44% of all such direct mail solicitations are disposed of unopened and unread. *Time*, November 26, 1990, at p. 64.

In response to the Connecticut court's rationale it might also be pointed out that, even if we accept the argument that catalogs and flyers become the consumer's property when they are received and that the consumer must therefore contribute to the cost of their disposal, it is the consumer, not the out-of-state seller, who bears the ultimate burden of the use tax. The benefit that the mail order seller receives through the waste collection and disposal services of the state are certainly direct enough to support imposition of the purely administrative burden of collecting and remitting the use tax. See *National Geographic*, *supra*.

Quill also derived other benefits from the State. Because Quill retained ownership rights in its QSL software and accompanying user documentation, Quill received fire and police protection for its property within the State. The record also demonstrates that Quill contacted North Dakota financial institutions to check credit information on customers, an activity furthered by State regulation of the banking industry.

We conclude that Quill's significant economic presence within the State and its retained ownership of property

[15] Recent estimates indicate that such "junk" mail "is now a nearly 4 million-ton colossus that accounts for 39% of all U.S. postal volume. This year about 41 lbs. of junk mail have been generated for each adult American." *Time*, November 26, 1990, at pp. 63-64.

within the State generate a constitutionally sufficient nexus to justify imposition of the purely administrative duty of collecting and remitting the use tax. We also conclude that the State provides benefits, services, and opportunities which significantly aid Quill's business and which are related to the use tax. Accordingly, the use tax as applied to Quill satisfies the four-prong test of *Complete Auto* and does not violate the Due Process Clause or the Commerce Clause.

Because we hold that the State may constitutionally require Quill to collect and remit use tax on its North Dakota sales, the State's conduct provides no basis for relief under 42 U.S.C. §§ 1983 and 1988. It is therefore unnecessary to address Quill's cross-appeal.

The judgment of the district court is reversed and we remand for entry of a judgment declaring that Quill is a "retailer maintaining a place of business in this state" required to collect and remit use tax in accordance with Chapter 57-40.2, N.D.C.C.

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

IN DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT
CIVIL NO. 41677

State of North Dakota by and through its Tax Commissioner, Heidi Heitkamp,
Plaintiff,

vs.

Quill Corporation,
Defendant.

JUDGMENT ON REMAND

Pursuant to the Judgment entered in this case on appeal to the Supreme Court, State of North Dakota, Supreme Court File No. 900257, dated May 7, 1991, and certified to this court on May 31, 1991, it is

ADJUDGED AND DECREED that the Defendant Quill Corporation is a "retailer maintaining a place of business in this state" required to collect and remit use tax in accordance with North Dakota Century Code ch. 57-40.2.

WITNESSETH, my hand and the seal of this Court, this 5th day of June, 1991.

[Signed]
Debra Huntley
Clerk of the District Court

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

IN DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT

STATE OF NORTH DAKOTA, BY AND THROUGH ITS TAX COMMISSIONER, HEIDI HEITKAMP, Plaintiff,	)	CIVIL NO. 41677
-v-	)	
QUILL CORPORATION, Defendant.	)	MEMORANDUM OPINION

This action brought by the State of North Dakota seeks to have the Quill Corporation declared a "retailer" for purposes of applying the North Dakota Sales and Use Tax on the distribution of Quill's products in our state. The Answer of Quill admits most of the facts alleged by the State, but specifically denies they are required to obtain a certificate of authority to do business in our state or that they are liable to remit a use tax on the products sold here. They specifically claim that the Tax Commissioner is acting in violation of the commerce clause of the United States Constitution.

The basis for taxation of products in North Dakota is Section 57-40.2-01(6) which amended the definition of "retailer" in 1987 to read as follows:

> "A retailer also includes every person who engages in regular or systematic solicitation of a consumer market in this state by the distribution of catalogs, periodicals, advertising fliers or other advertising, or by means of print, radio or television media, telegraphy, telephone, computer data base, cable, optic, microwave, or other communication system."

The facts of this matter show that Quill is a Delaware Corporation with its principal place of business in Illinois, with additional offices and warehouses in California. Quill solicits sales of merchandise through catalogs and advertising flyers mailed to customers throughout North Dakota from locations outside of North Dakota. Quill does not maintain any office, distribution house, sales house, warehouse or any other place of business in North Dakota; it does not have any agent, salesmen, or other type of representative to sell or take orders, to deliver merchandise, to accept payments or to service merchandise it sells here; it does not have any telephone listing or toll free telephone line, and does not advertise by any radio or television media in North Dakota; it does not advertise in any newspapers distributed in North Dakota, nor solicit business in any fashion other than by catalog or flyer. All of the business conducted in North Dakota is done by United States mail, telephone or common carrier.

The point at which the parties depart in their interpretation of the facts is whether Quill has any real or personal tangible property in the State of North Dakota. The argument advanced by the state is that since Quill sells all of its items with an unequivocal ninety day guarantee, Quill remains the owner of such property until this approval period expires. Quill, on the other hand, claims that title passes at the time the property is shipped from their outlets in Illinois or California.

It seems clear to the Court that the case of *Hess v. Illinois*, 386 US 753 (1967) prohibits this type of legislation. In *Hess*, the facts are very similar to those found in this case. Hess was a mail order house with its principal place of business in Missouri. Its sales to Illinois residents were substantial. Hess's manner of doing business in Illinois was similar to that of Quill in this case. The Supreme Court of the United States ultimately stated that there was insufficient nexus with the Hess Corporation to tax the sales that were taking place through the use of the mails.

In attempting to differentiate itself from that decision, the State, in this case, has chosen to identify the ninety-day guarantee as a "sale on approval". This argument has been advanced in numerous other states without success, and the Court finds no reason to adopt that theory here. I am satisfied that title changes hands at the time of the mailing, and that the risk on the items sold in this manner fall upon the purchaser in North Dakota at the time they receive the property, and not ninety days later as the state suggests.

Many of the arguments made by the State in this case are merely restatements of the remarks made by Mr. Justice Fortas in the *Hess* case. His dissent very logically sets forth reasons why *Hess* should have been taxed in Illinois, but the Supreme Court in that case failed to adopt his arguments. Although I find the arguments quite persuasive, this is not the law of the United State nor of the State of North Dakota.

Hess does, however, set forth the rationale for state taxation on interstate commerce. These concepts are set forth in the decision and read as follows:

> "State taxation falling on interstate commerce . . . can only be justified as designed to make such commerce bear a fair share of the cost of a local government whose protection it enjoys. . . . And in determining whether a state tax falls within the confines of the Due Process Clause, the Court has said that the simple but controlling question is whether the state has given anything for which it can ask return." See *Hess* at page 756.

Rather than dwell on the intricacies of title passing as the State has done in this case, they should have been presenting facts to the Court showing that the State of North Dakota spends funds for the protection and benefit of the mail order business. By doing so, they could show that taxation was not only for the benefit of local residents, but for the benefit of the mail order houses. Until these facts can be obtained, there is no nexus to allow the state to define retailer in the manner it chose. The mere fact that this appears to be unfair to the local retrailers [sic] cannot be a determining factor in this case. The focus must be on the beneficiary of the taxes as opposed to the consequences. Until this can be established, it would appear that the tax dollars spent protects the local resident and does not benefit the out of state mail order business in any significant manner.

The State, during argument, urged that the reasoning of *Goldberg v. Sweet*, 488 US ____ 102 LEd 2d 607, 109 S Ct 582 (1989), extends the taxing arm of the State to Quill. However, the primary difference in that case is that the parties stipulated Illinois had a substantial nexus with the interstate telecommunications reached by the Tax Act. That is precisely the issue in controversy in this case, and on which I fail to find any presence (nexus) of Quill in North Dakota.

Based on the foregoing, the language heretofore quoted in Section 57-40.2-01(6) and that found in subsection 7 is declared to be in violation of the United States Constitution and accordingly declared invalid as applied to Quill.

Counsel for the defendant may prepare the appropriate Order for Summary Judgment granting relief to them. The Court does not grant attorney's fees to the defendant, but only costs.

Dated: May 15, 1990
At Bismarck, North Dakota

BY THE COURT:

[Signed]

Benny A. Graff, District Judge

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

IN DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT
Civil No. 41677

STATE OF NORTH DAKOTA, by and through its TAX COMMISSIONER, HEIDI HEITKAMP,	)	
Plaintiff,	)	ORDER FOR JUDGMENT
vs.	)	
QUILL CORPORATION,	)	
Defendant.	)	

The above entitled matter having come before the Court on a motion for partial summary judgment by the Defendant, and a cross-motion for summary judgment by the Plaintiff, the parties having appeared through counsel of record and having filed briefs in support of and in opposition to the respective motions and having presented oral arguments to the Court, the Court being fully advised in the premises herein and having issued its Memorandum Opinion herein on May 15, 1990, wherein the Court held that application of N.D.C.C. § 57-40.2-01(6) and § 57-40.2-01(7) to Defendant Quill Corporation was in violation of the United States Constitution and accordingly said statutes were declared invalid as applied to Quill Corporation; the Court now makes the following ORDER:

1. The Defendant's motion for partial summary judgment is granted;

2. The Plaintiff's cross-motion for summary judgment is denied;

3. The Defendant shall recover its costs according to North Dakota law, but its counterclaim seeking attorneys' fees under 42 U.S.C. § 1988 is denied; and

4. The Clerk is directed to enter judgment in accordance with this Order.

Dated this 11th day of June, 1990.

BY THE COURT:

[Signed]
BENNY A. GRAFF
Judge of the District Court

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

IN DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT
Civil No. 41677

STATE OF NORTH DAKOTA, by and through its TAX COMMISSIONER, HEIDI HEITKAMP,	)	
Plaintiff,	)	JUDGMENT
vs.	)	
QUILL CORPORATION,	)	
Defendant.	)	

Pursuant to the Order for Judgment entered and filed herein, it is

ADJUDGED AND DECREED that the Defendant Quill Corporation is not required to obtain a North Dakota sales and use tax permit and is not required to collect or remit North Dakota sales or use tax on its mail-order sales, as application of N.D.C.C. § 57-40.2-01(6) and § 57-40.2-01(7) to Quill Corporation is in violation of the United States Constitution and said statutes are invalid as applied to Quill Corporation; that the Defendant shall recover its costs according to North Dakota law; and that the Defendant's counterclaim is dismissed with prejudice.

WITNESS, The Honorable Benny A. Graff, District Judge, South Central Judicial District, Burleigh County, North Dakota, and my hand and the seal of said Court, this 11th day of June, 1990.

[Signed]
Marian Barbie
Clerk of the District Court

UNITED STATES
CONSTITUTIONAL PROVISIONS INVOLVED

art. I, section 8, cl. 3. The Congress shall have Power . . .

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

art. VI. . . . This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

amend. XIV. section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS INVOLVED

NORTH DAKOTA
CHAPTER 57-40.2
USE TAX ACT

Sec. 57-40.2-01. Definitions. In this chapter, unless the context and subject matter otherwise require:

1. "Business", . . . "gross receipts", . . . "retail sale", "sale", each shall have the meaning given to it in section 57-39.2-01.

* * *

3. "Purchase" means any transfer of title or possession, exchange, or barter, conditional or otherwise, in any manner or by any means whatsoever, for a consideration. "Purchase" shall also mean the severing of sand or gravel from the soil of this state.

* * *

6. "Retailer" includes every person engaged in the business of selling tangible personal property for use . . . A retailer also includes every person who engages in regular or systematic solicitation of a consumer market in this state by the distribution of catalogs, periodicals, advertising flyers, or other advertising, or by means of print, radio or television media, by mail, telegraphy, telephone, computer data base, cable, optic, microwave, or other communication system.

7. "Retailer maintaining a place of business in this state", or any like term, shall mean any retailer having or maintaining within this state, directly or by a subsidiary, an office, distribution house, sales house, warehouse, or other place of business, or any agent operating within this state under the authority of the retailer or its subsidiary, whether such place of business or agent is located in the state permanently or temporarily, or whether or not such retailer or subsidiary is authorized to do business within this state. . . . It also includes every person who engages in

regular or systematic solicitation of sales of tangible personal property in this state by the distribution of catalogs, periodicals, advertising flyers, or other advertising, by means of print, radio or television media, or by mail, telegraphy, telephone, computer data base, cable, optic, microwave or other communication system for the purpose of effecting retail sales of tangible personal property.

8. "Tangible personal property" means:

a. Tangible goods, . . . when furnished or delivered to consumers or users within this state.

. . .

9. "Use" shall mean the exercise by any person of any right or power over tangible personal property incident to the ownership or possession of that property, . . .

Sec. 57-40.2-02.1. Use tax imposed.

1. Except as otherwise expressly provided . . . an excise tax is imposed on the storage, use, or consumption in this state of tangible personal property purchased at retail for storage, use, or consumption in this state, at the rate of five percent of the purchase price of the property. . .

Sec. 57-40.2-05. Evidence of use. For the purpose of the proper administration of this chapter, and to prevent evasion of the tax, evidence that tangible personal property was sold by any person for delivery in this state shall be prima facie evidence that such tangible personal property was sold for use in this state.

Sec. 57-40.2-06. Payment of tax. The tax imposed by this chapter shall be paid in the following manner:

1. The tax upon tangible personal property which is sold by a retailer maintaining a place of business in this state, . . . shall be collected by the retailer and remitted to the commissioner as provided by section 57-40.2-07, . . .

2. The tax, when not paid in conformity with subsection 1 of this section, shall be paid to the tax commissioner directly by any person storing, using, or consuming such property within this state, pursuant to the provisions of section 57-40.2-07.

Sec. 57-40.2-07. Collection of use tax. The tax imposed by this chapter shall be collected in the following manner:

1. Except as otherwise provided . . . every retailer maintaining a place of business in this state and making sales of tangible personal property for use in this state, not exempted . . . before making any sales shall obtain a permit from the commissioner to collect the tax imposed by this chapter, which permit shall be subject to all of the requirements, conditions, and fees for its issuance that apply with respect to a retail sales tax permit, and at the time of making such sales, whether within or without the state shall . . . collect the tax imposed by this chapter from the purchaser, and give to the purchaser a receipt therefor in the manner and form prescribed by the tax commissioner, if the commissioner, by regulation, shall require such receipt. Each such retailer shall list with the tax commissioner the name and address of all his agents operating in this state, and the location of each of his distribution or sales houses or offices or other places of business in this state.

* * *

3. The tax required to be collected, and any tax collected, by any retailer under subsections 1 and 2 of this section shall constitute a debt owed by the retailer to this state.

4. . . . each retailer required or authorized, pursuant to this section, to collect such tax shall pay the tax in quarterly installments on or before the last day of the month next succeeding each quarterly period ending March thirty-first, June thirtieth, September thirtieth, and December thirty-first of each year. . . . Every retailer, at the time of making the return required by this chapter, shall compute and pay to the commissioner the tax due for the preceding period.

5. . . . the retailer, on or before the last day of the month following the close of the first quarterly period as defined in subsection 4 of this section, and on or before the last day of the month following each subsequent quarterly period of three months, shall make out a return for the preceding quarterly period in such form and manner as may be prescribed by the commissioner, showing the gross receipts of the retailer, the amount of the tax for the period covered by such return, and such further information as the tax commissioner may require to enable him correctly to compute and collect such tax, but the tax commissioner, upon receipt of a proper showing by any retailer of the necessity therefor, may grant unto such retailer an extension of time not to exceed thirty days for making such return. . . The commissioner, if he deems it necessary or advisable in order to insure the payment of the tax, . . . may require returns and payment of the tax to be made for annual periods or other than quarterly periods, . . . A return shall be signed by the taxpayer or his duly authorized agent and shall contain a written declaration that it is made and subscribed under penalties of this chapter.

6. . . . any person who uses any property upon which the said tax has not been paid, either to the retailer or directly to the tax commissioner, shall be liable therefor, and, on or before the last day of the month next succeeding each quarterly period, shall pay the tax upon all such property used by him during the preceding quarterly period, in such manner and accompanied by such returns as the commissioner shall prescribe.

* * *

8. The commissioner, when in his judgment it is necessary and advisable to do so in order to secure the collection of such tax, may require any person subject to the tax to file with him a bond, issued by a surety company authorized to transact business in this state and approved by the commissioner of insurance as to solvency and responsibility, in such

amount as the commissioner may fix, to secure the payment of any tax or penalties due or which may become due from such person. In lieu of such bond, securities approved by the tax commissioner, in an amount which he may prescribe, may be deposited with him, and such securities shall be kept in the custody of the commissioner, . . .

Sec. 57-40.2-07.1. Deduction to reimburse retailer for administrative expenses.

1. A retailer who pays the estimated tax due under section 57-40.2-07 within the time limitations prescribed may deduct and retain one and one-half percent of the tax due.

* * *

3. The deduction allowed retailers by this section is to reimburse retailers for expenses incurred in keeping records, preparing and filing returns, remitting the tax, and supplying information to the commissioner upon request.

Sec. 57-40.2-08. Unlawful advertising. It shall be unlawful for any retailer to advertise or hold out or state to the public or to any purchaser, consumer, or user, directly or indirectly, that the tax or any part thereof imposed by this chapter will be assumed or absorbed by the retailer, or that it will not be added to the selling price of the property sold, or if added that it or any part thereof will be refunded.

Sec. 57-40.2-09. Records required. Each retailer required or authorized to collect the tax imposed by this chapter, and each person using in this state tangible personal property purchased shall keep such records, receipts, invoices, and other pertinent papers as the tax commissioner shall require and each such retailer or person shall preserve for a period of three years and three months all invoices and other records of such tangible personal property purchased for resale or for use. The commissioner, or any duly authorized agent, may examine the books, papers, records, and equipment of any person who sells tangible personal property or who is liable for such tax, and may investigate the character of the business of

any such person to verify the accuracy of any return made, or if no return was made, to ascertain and determine the amount due. Any such books, papers, and records shall be made available within this state for such examination upon reasonable notice if the tax commissioner shall make an order to that effect.

Sec. 57-40.2-10. Revocation of permit and authority to do business. If any retailer maintaining a place of business in this state, or authorized to collect the tax imposed by this chapter, fails to comply with any of the provisions of this chapter, or with any order or regulation of the commissioner, the commissioner, by order, may revoke the permit, if any was issued to such retailer . . . Any order shall be made under this section only after a retailer has had an opportunity, upon ten days' notice of the time, place, and purpose of a hearing, to show cause why such order should not be made. The tax commissioner may issue a new permit after a revocation.

Sec. 57-40.2-12. Unlawful sale or soliciting. No agent, canvasser, or employee of any retailer, not authorized by permit from the commissioner of this state, shall collect the tax as prescribed by this chapter, nor sell, solicit orders for, nor deliver, any tangible personal property in this state.

Sec. 57-40.2-13. Provisions of sales tax law applicable. The provisions of chapter 57-39.2, pertaining to the administration of the retail sales tax, including provisions for refund or credit provided therein, not in conflict with the provisions of this chapter, shall govern the administration of the tax levied in this chapter.

Sec. 57-40.2-15. Penalties—Offenses.

1. Any person failing to file a return or corrected return or to pay any tax imposed pursuant to this chapter, within the time required by this chapter, is subject to a penalty of five percent of the amount of tax due or of five dollars, whichever is greater, plus interest of one percent of the tax for each month or fraction of month except the first month after the return or the tax became due. Any person on a monthly filing schedule with seven

to fourteen delinquent original returns or payments, and any person other than a monthly filer with four to eight delinquent original returns or payments, is subject to a penalty of ten percent of the tax due or twenty-five dollars, whichever is greater, plus interest of one percent of the tax per month or fraction of a month of delay except the first month after the return or tax became due. Any person on a monthly filing schedule with fifteen or more delinquent original returns or payments, and any person other than a monthly filer with nine or more delinquent original returns or payments, is subject to a penalty of fifteen percent of the tax due or one hundred dollars, whichever is greater, plus interest of one percent of the tax due per month or fraction of a month of delay except the first month after the return or tax became due. The commissioner, if satisfied that the delay was excusable, may waive, and if paid, refund all or any part of the penalty and interest. The penalty and interest must be paid to the commissioner and disposed of in the same manner as the tax with respect to which it is attached. Unpaid penalties and interest may be enforced in the same manner as is the tax.

* * *

3. The certificate of the commissioner to the effect that a tax has not been paid, that a return has not been filed, or that information has not been supplied pursuant to the provisions of this chapter, shall be prima facie evidence thereof.

4. Any person failing to comply with any of the provisions of this chapter, or failing to remit within the time herein provided to the state the tax due on any sale or purchase of tangible personal property subject to the tax imposed under the provisions of this chapter, shall be guilty of a class A misdemeanor.

Sec. 57-40.2-15.1. Corporate officer liability. If a corporation holding a permit issued pursuant to the provisions of this chapter fails for any reason to file the required returns or to pay the tax due, any of its officers having control, or supervision of, or charged with the responsibility for making such returns and payments shall

be personally liable for such failure. The sum due for such a liability may be assessed and collected pursuant to the provisions of this chapter for the assessment and collection of other liabilities.

Sec. 57-40.2-16. Lien of tax—Collection—Action authorized.

1. Whenever any person liable for payment to the commissioner of the tax imposed by this chapter or for any penalties in respect thereto refuses or neglects to pay the same the amount, including any interest, penalty, or addition to such tax, together with the costs that may accrue in addition thereto, shall be a lien in favor of the state of North Dakota upon all property and rights to property, whether real or personal, belonging to said taxpayer, . . .

2. The lien aforesaid shall attach at the time the tax first becomes payable, as provided by section 57-40.2-07, and shall continue until the liability for such amount is satisfied.

* * *

10. Remittances on account of tax due under this chapter shall not be deemed or considered payment thereof unless or until the commissioner shall have collected or received the amount due for such tax in cash or equivalent credit.

Sec. 57-40.2-17. Disposition of excess tax collections. Whenever a retailer maintaining a place of business in this state has collected a use tax from a customer in excess of the amount prescribed or due under this chapter, and if the retailer does not refund the excessive tax collected to the customer, the amount so collected by the retailer shall be paid by the retailer to the commissioner in the quarterly period in which the excessive collection occurred. If the excessive collection is subsequently refunded by the retailer to the customer, the retailer may deduct, as a credit against his use tax liability on the next return that he is required to file, the amount of use tax properly refunded to the customer. . .

NORTH DAKOTA
CHAPTER 57-39.2
SALES TAX ACT

Section 57-39.2-01. Definitions. The following words, terms, and phrases . . . have the meaning ascribed to them in this section, except where the context clearly indicates a different meaning:

1. "Business" includes any activity engaged in by any person or caused to be engaged in by him with the object of gain, benefit or advantage, either direct or indirect.

* * *

3. "Gross receipts" means the total amount of sales of retailers, valued in money, whether received in money or otherwise. . .

* * *

7. "Retail sale" or "sale at retail" means the sale, including the leasing or renting, to a consumer or to any person for any purpose, other than for processing or for resale, of tangible personal property; . . . the delivery of possession within the state of North Dakota of tangible personal property by a wholesaler or distributor to an out-of-state retailer who does not hold a North Dakota retail sales tax permit . . . may not be considered a taxable sale if such delivery of possession would not be treated as a taxable sale in that state. . .

* * *

9. "Sale" means any transfer of title or possession, exchange or barter, conditional or otherwise, in any manner or by any means whatever, for a consideration. . .

NORTH DAKOTA
ADMINISTRATIVE PROVISIONS INVOLVED

N.D. Admin. Code §81-04.1-01-03.1. Definitions. Any person having nexus in North Dakota and making taxable sales in or making taxable sales having a destination in North Dakota must obtain a North Dakota sales and use tax permit from the tax commissioner and collect and remit tax on these sales.

For purposes of implementing subsection 8 of North Dakota Century Code section 57-39.2-01 and subsection 5 of North Dakota Century Code section 57-40.2-01, unless the context otherwise requires:

1. "Advertisement" means any message by which a retailer solicits retail sales of tangible personal property. It includes but is not limited to:

   a. Each transmittance, by United States mail, common carrier or otherwise, of a printed sales solicitation message in the form of a bulk mailing or bulk delivery, a sales catalog, brochure, advertising flier, billing or package insert or similar publication or device.

   b. Each transmittance of a sales solicitation message by space advertising in a newspaper, magazine or other publication, which is local, regional, or national in nature.

   c. Each transmittance of a sales solicitation message by radio, television, telephone, telegraph, computer data base, or by cable, optic, microwave or other electronic means, or by any other communications means.

2. "Destination" means the location to which the delivery of tangible personal property is made by a retailer or retailer's agent.

3. "Regular or systematic solicitation" means three or more separate transmittances of any advertisement or advertisements during a testing period.

4. "Separate transmittance" means any transmittance of an advertisement during any twenty-four hour period.

5. "Solicitation" means:

   a. Offering, by advertisement, to make a taxable sale with a destination in North Dakota.

   b. Inviting offers to purchase tangible personal property for delivery in North Dakota.

6. "Taxable sale" means a sale made by a retailer or a retailer maintaining a place of business in this state to purchasers for final use or consumption and not for resale or processing.

7. "Testing period", with respect to the determination of whether a person is required to obtain a permit and collect use tax as a retailer for tax periods commencing on or after the effective date of this section, means the twelve month period ending on September thirtieth of the preceding calendar year.

CHAPTER 851

HOUSE CONCURRENT RESOLUTION NO. 3083
(Representatives Hoffner, Kloubec)
(Senator Nething)
(Approved by the Committee on Delayed Bills)

MAIL ORDER SALES TAX IMPOSITION

A concurrent resolution urging the Congress of the United States to enact legislation to allow imposition of state sales and use taxes on mail order sales to purchasers within a state by out-of-state mail order companies.

WHEREAS, in 1967 the Supreme Court of the United States, in its decision in *National Bellas Hess v. Illinois Department of Revenue*, ruled that states may not require collection of sales taxes or use taxes on mail order sales to residents of the state by certain out-of-state mail order companies; and

WHEREAS, the Supreme Court of the United States has acknowledged that the Congress of the United States has power to overturn its ruling and require firms to collect and remit states' sales and use taxes; and

WHEREAS, out-of-state mail order companies selling products within a state are in direct competition with state retailers; and

WHEREAS, state retailers contribute to the support of local governmental and educational services through payment of state and local taxes while out-of-state retailers contribute nothing to local governmental and educational services but compete in the same market with a considerable competitive advantage provided by the Supreme Court decision exempting them from sales and use taxes; and

WHEREAS, the Advisory Commission on Intergovernmental Relations estimates that in 1985 states lost nearly $1.5 billion in sales and use tax revenue by being prohibited from enforcing collection of sales and use taxes on certain out-of-state retailers, and it is likely that this revenue loss will continue to grow unless the United States Congress takes remedial action;

NOW, THEREFORE, BE IT RESOLVED BY THE HOUSE OF REPRESENTATIVES OF THE STATE OF NORTH DAKOTA, THE SENATE CONCURRING THEREIN:

That the Fiftieth Legislative Assembly urges the Congress of the United States to approve legislation to allow imposition of state sales and use taxes on mail order sales to purchasers within a state by out-of-state mail order companies; and

BE IT FURTHER RESOLVED, that the Secretary of State forward copies of this resolution to the chairmen of the House Committee on Ways and Means and the Senate Committee on Finance, and to each member of the North Dakota Congressional Delegation.

Filed April 2, 1987

1987 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HCR 3083

House Committee on FINANCE & TAXATION

Subcommittee on _____ Identify and check when appropriate

Conference Committee _____

Hearing Date 3-11-87

Tape Number 1 /Side A x B Meter # 50

Committee clerk signature JANICE STEN

Minutes:

REP. HOFFNER, DIST 32. Introduced HCR 3083. Recently, in a leadership meeting in Washington, one of the issues at the National Conference of State Legislators was recommending, that we go back home and grant legislation or resolutions urging Congress to enact legislation to impose a state sales and use tax on mail order sales to purchasers within a state to out of state mail companies.

The house of representatives passed HB 1195 some weeks ago by a wide margin and that has a fiscal positive impact on the state of about 14.1 million dollars. The state can only realize that revenue if Congress passes this kind of legislation. I think there is a lot of fairness in this.

I had a chance to visit with members of Congressman Dorgan's office and Congressman Dorgan had introduced legislation so had Rep. Brooks of Texas, so there is legislation currently before the Congress to allow states to

collect this tax. They all stated that support from the states will go a long way to getting this passed. There appears to be a concensus that it will be more likely to pass this session then any previous session. More of the power brokers are looking at this in a very serious way. I would hope the committee would look favorably on this.

REP. HAUSAUER TO WALT STACK. A bill we had earlier pertaining to this, has that passed the senate?

WALT STACK Yes, it has passed the senate, it is now in the governor's office. It does carry an emergency clause so it will become effective as soon as the governor signs it.

REP. HANSON Do we have any firms in the state which this would affect the other way?

WALT STACK Yes, there are some out there, from time to time our office does get calls indicating they are in a small mail order business and that they do a lot of mailing out of state. They might also be affected.

The bills that are in the federal congress all carry a minimum amount that needs to be done. So none of the very small people would be affected at all.

With no further testimony, the hearing was closed.

COMMITTEE ACTION 3-11-87

REP. ANDERSON made a motion for a Do Pass. REP. DE MERS second the motion. Motion carried and was placed on the consent calendar.

14 Yes 0 No 3 Absent

TESTIMONY BEFORE THE HOUSE FINANCE AND TAXATION COMMITTEE

M. K. HEIDI HEITKAMP,
STATE TAX COMMISSIONER

January 13, 1987

Chairman Hausauer, Committee Members: HB 1195 is part of the Tax Department's continuing effort to stop the sales and use tax loss, caused by the decision in *National Bellas Hess vs. Department of Rev.*, 386 U.S. 753, 87 S.Ct. 1389 (1967), from out-of-state mail orders and to help prevent unfair competition against businesses located in this state.

In *National Bellas Hess*, the United States Supreme Court held that the State of Illinois had no power to impose a use tax liability on an out-of-state mail order firm where the mail order firm maintained no office, had no agents or solicitors, owned no property, and had no telephone listing in Illinois, and where all contacts which the firm had with the state were via United States mail or common carrier. The Court considered this assessment effort an interference with interstate commerce.

The decision continues to allow out-of-state direct marketers and border sellers to refuse to collect "use" taxes from buyers and remit the tax to the home state and/or city of the purchaser. Though consumers who buy from out-of-state businesses are legally liable for "use" taxes, the cost of collection from all but the largest buyers far exceeds the revenue recovered. Consequently states and cities receive little of the amount owed in use taxes. Public awareness of the use tax has remained low in the absence of an effective collection system. Most of the 46 states (including the District of Columbia) with a sales

tax (on in-state purchases) also impose a use tax on purchases by their residents in another state.

THE EXPLOSION IN UNTAXED, OUT-OF-STATE FIRMS

Sales by firms covered by the Supreme Court decision have mushroomed in the last five years. These untaxed, out-of-state firms fall into two broad categories: (1) direct marketers, and (2) border sellers.

Direct marketers are those whose solicitation methods include mail-order catalogs, telephone selling, direct-response commercials, advertising inserts, computer shopping, and other high-tech methods. They run a $150-billion-a-year business accounting for *14 percent of all retail sales*. By 1990, direct marketers will control 20 percent of retail sales, according to the Direct Marketing Association (DMA). It says 6 billion copies of 6,500 direct mail catalogs were sent to U.S. homes in 1985—more than double the figure of five years ago—and an average of 80 catalogs per home. Four of five mail-order catalog purchases are placed by phone, the DMA reports. The independent Advisory Commission on Intergovernmental Relations (ACIR) estimated that the mail-order catalog business grossed $44- to $70-billion in 1985.

Border sellers, usually located just across city or state lines, thrive on the differences in sales tax rates. Located near the borders of adjacent jurisdictions, they ship products across state lines, enabling consumers to avoid sales tax on even routine purchases. Since out-of-state border sellers aren't obligated to cooperate with tax officials from other states, it is difficult to collect use taxes. The increasing reliance of some jurisdictions on sales taxes has increased the revenue loss caused by border sellers.

REVENUE LOSSES TO CITIES AND STATES

Out-of-state businesses threaten the future of the sales tax, which is the second most important state revenue source, accounting for one of every three general fund state tax dollars. Fourteen states rely on sales taxes for more than 40 percent of their revenues. Seven states—including Florida, Texas, Washington and West Virginia—depend on sales taxes for more than half their revenues. Only Alaska, Delaware, Montana, New Hampshire and Oregon impose no sales taxes. In the 46 states (including the District of Columbia) imposing sales taxes, rates range from 2.5 to 7.5 percent. The number of cities imposing sales taxes has shot up 43 percent in the last five years, from 4,462 to 6,397.

The increasing popularity of direct marketers and border sellers is eroding the sales tax base. From 1974 to 1984, the median state sales tax rose from 3.8 to 4.4 percent. In that period, 29 states raised their tax rate and only one cut its rate. City and state tax administrators face frequent projected revenue shortfalls. Much of the problem is out-of-state firms and their tax-free 14 percent share of retail sales. According to ACIR, states and cities will lose $667 million to $1.57 billion in 1985 to out-of-state direct marketers and border sellers. ACIR estimates that 38 of the 46 sales tax states lost at least $10 million each in sales tax revenues in 1985.

State tax officials and retailers are also concerned that the loss of tax revenue from out-of-state businesses is exacerbating the worst elements of the sales tax. Those who do not have access to these non-taxable sales schemes bear a larger share of the sales tax burden, thus increasing the regressiveness of the sales tax.

UNFAIR COMPETITION FROM UNTAXED, OUT-OF-STATE FIRMS

The fate of the sales tax interests others than just state tax officials. Economists Ronald C. Fisher of Michigan State and John Mikesell of Indiana University estimate that a 1 percent increase in a sales tax rate may reduce local retail sales 6 percent, as consumers find ways to beat the tax. These sales losses to Main Street merchants are gains for direct marketers and border sellers.

This unfair advantage for untaxed, out-of-state firms threatens the future of Main Street America. Retailers and tax administrators are caught in a vicious cycle: Higher sales tax rates are chasing more customers to out-of-state firms, who have a price advantage equal to the tax rate of the customer's home city or state. The "discount" ranges from 2.5 to more than 8 percent. ACIR concludes that the "virtual tax immunity" of out-of-state firms send customers to direct marketers and border sellers.

FEDERAL LEGISLATION FOR FAIRNESS IN SALES TAXES

U.S. Representative Jack Brooks introduced a bill in the last Congress to correct the problem *National Bellas Hess* created. H.R. 5021, the Equity in Interstate Competition Act, requires retailers who regularly solicit customers in another state to report their collections quarterly. The bill contained a *de minimus* rule which provided that only those out-of-state businesses with at least $12.5 million in sales nationwide or $500,000 to residents of a given state would have to remit taxes to that state. The bill also mandates a single state tax rate, regardless of additional local taxes, for purposes of interstate collections. Representative Brooks' bill enjoys the strong support of the Na-

tional Association of Tax Administrators and the Multistate Tax Commission. ACIR has endorsed its components.

The 100th Congress will undoubtedly consider similar bills requiring the remittance of use taxes by mail order retailers.

HB 1195 accomplishes two things. First, it clarifies that it is the intent of the Legislature that mail order sales be subject to the sales and use tax. This clarification allows the State Tax Department to pursue mail orders without fear that a court will reject the claim because the tax is not based broad enough. Second, this Bill prepares the State for immediate implementation of any federal legislation.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

---o0o---

BEFORE THE HONORABLE:
MILTON L. SCHWARTZ, JUDGE

---o0o---

DIRECT MARKETING,	)	
	)	
Plaintiff,	)	
vs.	)	NO. Civ S-88-1067
	)	
BENNETT, et al.,	)	
	)	
Defendants.	)	

---o0o---

REPORTER'S TRANSCRIPT

JUNE 28, 1991

---o0o---

Reported by: JANE E. BEAUCHAMP, CSR #6408

APPEARANCES:

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SACRAMENTO, CALIFORNIA,
FRIDAY, JUNE 28, 1991

2:00 P.M.

---oOo---

THE COURT: The following constitutes the decision of the Court on these cross-motions for summary judgment.

Plaintiff, Direct Marketing Association, Inc., filed this section 1983 action on behalf of its members seeking declaratory and injunctive relief.

The controversy arose when defendants, individual members and officers of the California Board of Equalization demanded that plaintiff's members collect a use tax from their California customers if they, one, maintain substantial and recurring solicitations of and sales to California customers; and two, accept credit cards issued by California financial institutions. Plaintiff contends that imposition of use tax liability in this case is unconstitutional because there is an insufficient connection between California and the members it seeks to tax.

The Supreme Court has held that under the due process clause of the 14th amendment and the commerce clause, a state may not impose the burden of use tax collection against an out-of-state entity unless there is a sufficient nexus between the state and the entity. National Bellas Hess, Inc. v. Department of Revenue of the State of Illinois, 386 U.S. 754 (1967). In applying that rule, the Court has found a sufficient nexus where the out-of-state entity has a place of business, employees or property within the state. It has found the nexus insufficient where the only connection with customers in the taxing state is by common carrier or the United States mail.

According to the facts presented to the Court by stipulation of all parties in this case, plaintiff's members do not have offices, outlets, stores, warehouses or other facilities, stocks of goods, real property or employees in California. They do not have agents, independent contractors, or representatives soliciting sales in California. They do not maintain bank accounts in California. They do not ship products to California customers from any location in California. Plaintiff contends that in light of these facts, the Supreme Court's holding in National Bellas Hess compels this Court to rule that defendant's imposition of use tax liability is unlawful.

Defendants, however, contend that plaintiff interprets the sufficient nexus test too narrowly. According to defendants, there is sufficient nexus in this case because plaintiff's members accept credit cards issued by California financial institutions. The parties agree that a substantial portion of the credit card sales to California customers are charged to the customers' VISA and MasterCard credit cards issued by California banks. Defendants argue that other factors also weigh in favor of a finding of nexus, including the fact that defendants' advertisements and catalogues generate literal garbage which must be disposed of by the state, and the fact that sales to California residents require California 800 line telephone calls, debt collection in this state, and frequent shipments to California on state highways.

Defendants also contend that a rigid application of the doctrine articulated in National Bellas Hess is improper for several reasons. They contend that because the direct marketing industry has grown dramatically since National Bellas Hess was decided in 1967, the doctrine of that case is obsolete. They also contend that since the Supreme Court has expanded its notion of what constitutes "minimum contacts" with respect to personal jurisdiction, it is

reasonable to assume that the Court is moving in the same direction with respect to sufficient nexus and use tax liability.

This Court does not find these arguments persuasive. The Court does not find use of California financial institutions or any of the other factors mentioned by defendants to be comparable to the maintenance of retail outlets, employees, or property within the State. Additionally, although the direct marketing industry may have only been a fraction of its current size at the time the case was decided, the sales transactions which took place between Bellas Hess and its Illinois customers clearly required reliance on Illinois financial institutions. The dissent found this significant in terms of meeting the sufficient nexus test, but clearly the majority did not.

Furthermore, defendants contend that International Shoe Company vs. Washington, 326 U.S. 310 (1945), stands for the proposition that the test for minimum contacts is or should be interchangeable with the test for sufficient nexus. The Court finds that this conclusion or reading of International Shoe is erroneous. Although the Court stated that the activities of the taxpayer in the taxing state subject it alike to taxation by the state and to suit to recover the tax, the Court's ruling was limited to the facts before it. Of course, the factors which are relevant to a determination of minimum contacts may also be relevant to a determination of sufficient nexus. Nonetheless, the two doctrines are distinct.

Defendants additionally argue that during the short time prior to customer acceptance, the goods plaintiff's members shipped to California residents remain the property of the members. Defendants conclude that because this property enjoys California police and fire protection, plaintiff's members are receiving a benefit from the state which justifies imposition of use tax liability. The Court

does not agree with this analysis. Title to the goods in question remains with the seller only where the sales are sales on approval pursuant to Uniform Commercial Code Section 2-326. There is no evidence or facts before the Court indicating the sales by plaintiff's members are on approval. The general presumption runs against delivery to a customer being a sale on approval. Gold 'N Plump Poultry, Inc. vs. Simmons Engineering Company, 805 Federal Second 1312 (Eighth Circuit 1988). In any event, a ruling in favor of plaintiff on this motion would not preclude defendants from imposing a use tax against an out-of-state retailer who maintained property in this state.

In sum, although defendants have raised a number of meritorious arguments as to why National Bellas Hess should be reconsidered or reversed or modified, this Court feels it is still bound by it. Consequently, the Court concludes that in the absence of a clearly distinguishing feature, defendants cannot lawfully require plaintiff's members to collect and remit a use tax on sales to California customers solely on the basis that those members maintain substantial and recurring solicitations and sales to California customers and accept credit cards issued by California financial institutions. Accordingly, the Court is compelled to grant plaintiff's motion for summary judgment and does do so hereby and denies defendants' cross-motion for summary judgment.

MR. ISAACSON: The only question I have, since summary judgment is being entered, it resolves all the issues in the case, is judgment also being entered in plaintiff's favor?

THE COURT: That follows the granting of the motion for summary judgment.

Also, the affidavit of Stephen Clegg filed on behalf of plaintiff on June 21, 1991, is stricken.

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CERTIFICATE OF COURT REPORTER

---o0o---

I, JANE E. BEAUCHAMP, Official Reporter, certify that the foregoing pages constitute a true and correct transcript of the testimony contained therein as reported by me and thereafter reduced to typewriting to the best of my ability.

July 2, 1991.

[Signed]

JANE E. BEAUCHAMP, CSR #6408
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

DIRECT MARKETING, ASSOCIATION INC.,	)	No. CIVS-88-1067 MLS
Plaintiff,	)	ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
v.	)	
WILLIAM M. BENNETT, et al.,	)	
Defendants.	)	

This matter came on for hearing on June 28, 1991, on the motion of Plaintiff DIRECT MARKETING ASSOCIATION, INC. for summary judgment and the cross-motion of Defendants WILLIAM M. BENNETT, et al. for summary judgment. Plaintiff was represented by George Isaacson of Brann & Isaacson and John A. Mendez of Downey, Brand, Seymour & Rohwer. Defendants were represented

by Steven J. Green, Deputy Attorney General, State of California.

The Court, having read and considered the motions, memoranda of points and authorities, stipulated facts, and affidavits submitted both in favor and in opposition thereto, and having heard the oral arguments of counsel, rendered its decision granting Plaintiff's motion for summary judgment and denying Defendants' cross-motion for summary judgment, in open court at the conclusion of the hearing. A transcript of the Court's decision is attached hereto and incorporated herein by reference. Good cause appearing therefor:

IT IS ORDERED that Plaintiff's motion for summary judgment in the above-captioned action is GRANTED.

IT IS FURTHER ORDERED that Defendants' cross-motion for summary judgment in the above-captioned action is DENIED.

Dated: July 12, 1991.

[Signed]

MILTON L. SCHWARTZ
U.S. DISTRICT COURT JUDGE

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No. 91-194

Supreme Court, U.S.
FILED
SEP 3 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

QUILL CORPORATION,

Petitioner,

vs.

STATE OF NORTH DAKOTA, BY AND THROUGH ITS TAX COMMISSIONER, HEIDI HEITKAMP,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of North Dakota

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a state may, consistent with the due process clause of the fourteenth amendment and with the commerce clause, require a direct marketing company to collect and remit the state use tax?

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No. 91-194

In The

Supreme Court of the United States

October Term, 1991

QUILL CORPORATION,

Petitioner,

vs.

STATE OF NORTH DAKOTA, BY AND THROUGH ITS TAX COMMISSIONER, HEIDI HEITKAMP,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of North Dakota

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

North Dakota use tax law requires "every retailer maintaining a place of business in this state" to collect use tax from its customers. N.D. Cent. Code §57-40.2-07 (Supp. 1991). Prior to 1987, "retailer maintaining a place of business" was defined as a retailer maintaining a physical office or location in the state. In 1987, this definition was amended to include a retailer who regularly or systematically solicits sales in North Dakota. N.D. Cent.

Code §57-40.2-01(7) (Supp. 1991). This statutory change forms the basis for the controversy in this case.

Petitioner, Quill Corporation ("Quill"), is a national direct marketer of office supplies and equipment. Quill has several thousand North Dakota customers. Appendix to the Petition for Writ of Certiorari ("Pet. App.") A2. These customers annually purchase just under $1,000,000 worth of Quill products. *Id.* This sales volume makes Quill North Dakota's sixth largest retailer of office equipment and supplies. Pet. App. A30.

Quill sells its merchandise using state of the art marketing techniques, including a computer software program that permits Quill customers to order, check inventories, and confirm prices directly with Quill and to communicate with other Quill customers about Quill products. Pet. App. A29-A30. Quill also makes extensive use of telephone and telecommunications technology to solicit and serve its North Dakota customers, including a twenty-four hour "help line" for customers to call with questions or comments about products. Pet. App. A2, A29-A30. Quill annually sends over sixty different bulk mailings of its catalogs and flyers to North Dakota residents. These mailings total more than 230,000 separate pieces of mail, cumulatively weighing over 24 tons. Pet. App. A2-A3.

In 1989, North Dakota notified Quill that, pursuant to North Dakota use tax law, it was required to obtain a permit and remit use tax. When Quill refused, North Dakota filed a declaratory judgment action, asking the North Dakota district court to declare Quill a retailer

maintaining a place of business in North Dakota.[1] Pet. App. A4. In defense, Quill argued that the statute violates the due process and commerce clauses of the United States Constitution as interpreted in *National Bellas Hess, Inc. v. Dep't of Revenue*, 386 U.S. 753 (1967).

The North Dakota district court ruled the statute was unconstitutional, and the State appealed to the North Dakota Supreme Court. Pet. App. A38. On review, the court concluded that "Quill's significant presence within the State and its retained ownership of property within the State generate a constitutionally sufficient nexus to justify imposition of the purely administrative duty of collecting and remitting the use tax." Pet. App. A36. Quill then petitioned this Court for review.

SUMMARY OF ARGUMENT

Certiorari may be denied in this case because the North Dakota Supreme Court did not disregard *National Bellas Hess*. The North Dakota Supreme Court considered the factual differences between National Bellas Hess and Quill, and concluded those differences supported a ruling for the State consistent with *National Bellas Hess*.

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[1] Since North Dakota seeks only the collection of its use tax and not the collection of local use tax, Quill's suggestion that, should North Dakota prevail, direct marketers must comply with the tax requirements of "approximately 6500 jurisdictions" grossly overstates the burdens at issue in this case. Petition for Writ of Certiorari ("Pet.") at 22.

It must be conceded, however, that North Dakota's decision arguably conflicts with *National Bellas Hess* because the court found nexus based primarily on marketing activities conducted by telecommunications, mail, and common carrier, and not based on physical location in the state. Other state courts have reached contrary conclusions by reading *National Bellas Hess* more rigidly. There is, therefore, confusion as to the appropriate nexus standards applicable to direct marketers. Because of the national significance of the issue raised in this case, this Court will probably review this issue sometime in the future. North Dakota's best interests are served by an earlier, rather than later, resolution of this issue. Therefore, the State agrees that the Court should grant certiorari on the question presented as reformulated in this response.

Certiorari should be denied as to Quill's second question because the question is not properly before the Court.

ARGUMENT

The facts of this case are distinguishable from those in *National Bellas Hess*. *National Bellas Hess* involved a direct mail marketer whose contacts with the market state were limited to two bulk mailings of catalogs, accompanied by sporadic mailings of flyers, followed by delivery of the goods by U.S. mail and common carrier. The Court in *National Bellas Hess* found that, given the potential burden on interstate commerce, these contacts were

not sufficient to require that National Bellas Hess collect Illinois use tax.

The North Dakota Supreme Court applied the *National Bellas Hess* decision to the present facts, taking into account the revolution in marketing and technology that has occurred since 1967. The court stated:

> We . . . are instructed to be cognizant of the vast differences between the mail order of the 1960's and the direct marketing of the 1990's when applying *Bellas Hess* in this case. In addition, the *Bellas Hess* majority specifically characterized the transactions there as being carried out only by mail or common carrier. Very little of the direct marketing of today is limited to mail or common carrier, and the facts of this case clearly demonstrate that Quill's business extended far beyond those limited circumstances.

Pet. App. A22.

As noted by the North Dakota Supreme Court, Quill's contacts with its North Dakota customers well exceeded those found in *National Bellas Hess*. On this ground alone, the Court appropriately could deny the Petition for Writ of Certiorari.

North Dakota recognizes, however, that special and important reasons may exist for this Court to grant the petition under Supreme Court Rule 10.1(b) and 10.1(c).

CONSIDERATIONS UNDER SUPREME COURT RULE 10.1(b)

The opinion below conflicts with recent decisions in Connecticut and Pennsylvania. In *SFA Folio Collections, Inc. v. Bannon*, 217 Conn. 220, 585 A.2d 666, *cert. denied sub nom. Comm'r of Revenue v. SFA Folio Collections, Inc.*, 111 S. Ct. 2839 (1991), the Connecticut Supreme Court strictly construed *National Bellas Hess* as requiring that a mail order business have some *physical connection* with the market state before the market state can impose its use tax collection duty consistent with the due process clause of the United States Constitution. *See also Cally Curtis Co. v. Groppo*, 214 Conn. 292, 572 A.2d 302, *cert. denied sub nom. Comm'r of Revenue v. Cally Curtis Co.*, 111 S. Ct. 77 (1990); *Bloomingdale's By Mail, Ltd. v. Commonwealth*, 567 A.2d 773 (Pa. Commw. Ct. 1989), *aff'd per curiam*, 591 A.2d 1047 (Pa. 1991).

In contrast to *SFA Folio*, *Cally Curtis*, and *Bloomingdale's By Mail, Ltd.*, the North Dakota Supreme Court recognized that a direct marketer's activities may create a sufficient "presence" within a state so as to support a constitutional use tax collection duty, even though that presence may not be the traditional "physical" presence.

If review is not granted in this case, the conflicting state standards and resulting confusion of the state tax administrators and direct marketers alike will only intensify. Because of the revolution in modern-day direct marketing methods, more than thirty states have amended their nexus statutes for use tax collection purposes to

include direct marketers.[2] Many of these statutes seek to impose a collection duty if the direct marketer maintains either a traditional "physical presence" within the state or, absent such physical presence, the marketer regularly or systematically solicits sales of goods to state residents. The enforcement of these newly adopted statutes will spawn additional litigation until this Court settles the issue presented by these statutes – the extent to which *National Bellas Hess* is applicable to modern marketing methods.[3]

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[2] Petitions for writs of certiorari have been granted where, as in this case, several states have adopted new legislation in an effort to impose use tax collection requirements on mail order businesses. *See New York v. Ferber*, 458 U.S. 747 (1982) (review granted on certiorari where lower court ruling brought into question constitutionality of child pornography statute where the federal government and 47 states had adopted statutes addressing the area); *see also New York v. O'Neill*, 359 U.S. 1 (1959) (review granted on constitutionality of Uniform Law to Secure Attendance for Witnesses from Within and Without a State in Criminal Proceedings that had been adopted by 42 states).

[3] *See, e.g., Direct Marketing Ass'n v. Bennett*, No. Civ. 8-88-1067 (E.D. Cal. June 28, 1991); *Bloomingdale's By Mail, Ltd. v. Huddleston*, No. 89-3017-II (Davidson County Ch. Ct., Tenn. March 8, 1991), *appeal docketed*, No. 01-S-01-9106-CH00047 (Tenn. Sup. Ct. 1991); *SFA Folio Collections, Inc. v. Huddleston*, No. 89-3015-III (Davidson County Ch. Ct., Tenn. March 11, 1991).

CONSIDERATIONS UNDER SUPREME COURT RULE 10.1(c)

The North Dakota Supreme Court also decided an important question of federal law – whether a direct marketer can be constitutionally "present" in the market state without being "physically" present in the state.

The North Dakota Supreme Court opinion describes the need for a nexus test that is not based solely upon physical presence, but looks at the economic realities of the relationships between the direct marketer and the market state. The shorthand reference to this additional basis for finding nexus is the "economic presence" standard. Under the economic presence standard, constitutional nexus exists when a direct marketer, that is not physically present within a state, regularly or systematically solicits the state's consumer market by any means and, as a result, realizes an economic gain.

This Court has not ruled directly on this issue. However, in *D.H. Holmes Co. v. McNamara*, 486 U.S. 24 (1988), the Court recognized the existence of "economic presence" in relationship to a direct marketer's duty to pay a use tax on advertising materials sent into a state. In upholding the duty to pay the tax, this Court noted "Holmes' significant economic presence in Louisiana, its many connections with the State, and the direct benefits it receives from Louisiana in conducting its business." *Id.* at 33; *cf. Goldberg v. Sweet*, 488 U.S. 252, 266-67 (1989) (addressing, in dicta, that issue).

It is likely that the direct marketing nexus issue will continue to be fought out in the states until this Court reviews an appropriate case. On the one hand, the state

tax administrators, including North Dakota's, are compelled to enforce statutes that are presumptively valid under state law. If these statutes or their application are found to be constitutionally infirm, those tax administrators face actions under 42 U.S.C. §1983 and 42 U.S.C. §1988.[4] Also, to the extent that states have obtained compliance with new nexus statutes, the states will encounter potential retroactive refund claims, which could have a large impact on states' treasuries. *See James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991); *McKesson Corp. v. Div. of Alcoholic Beverages and Tobacco*, 110 S. Ct. 2238 (1990); *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989).

At the same time many direct marketers, assuming that *National Bellas Hess* protects their activities, refuse to collect use taxes as required by newly adopted nexus statutes. If, at a later time, this Court finds these nexus statutes constitutional, direct marketers may find it difficult to pay the delinquent use tax liabilities and to recoup the tax from past customers.

The State of North Dakota now has a nexus statute that has been upheld by its supreme court. Under most circumstances, the State would oppose a petition for certiorari seeking review of the North Dakota Supreme Court's decision. The State recognizes, however, that the

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[4] Imposition of such potential liabilities is no longer a theoretical threat. *See Dennis v. Higgins*, 111 S. Ct. 865 (1991); *see also Swanson v. Powers*, No. 90-1110 (4th Cir. June 25, 1991) (initially holding the North Carolina Tax Commissioner individually liable for $140,000,000 for collecting taxes later held invalid in *Davis v. Michigan*, 489 U.S. 803 (1989)).

issue raised in this case has nationwide significance and will continue to be litigated in other states. Thus, even if certiorari is denied in this case, the Court is likely to grant certiorari in a similar case sometime in the future. If the Court were to conclude that a nexus statute like North Dakota's is unconstitutional, the State would encounter potentially large retroactive refund claims. *See, e.g., James B. Beam Distilling Co.; McKesson Corp.; Davis v. Michigan.* An early resolution of this issue will enable state tax administrators to properly enforce their state tax laws.

QUILL'S SECOND QUESTION PRESENTED, REGARDING RETROACTIVITY, RAISES AN ISSUE NOT PROPERLY BEFORE THE COURT

The North Dakota Supreme Court held that North Dakota's use tax nexus statute as applied to Quill is constitutional. Application of that decision to the effective date of the statute is not "retroactive." The statute was amended, approved, and filed on March 16, 1987, and became effective for all transactions occurring on or after July 1, 1987. 1987 N.D. Laws ch. 704. The legislation only seeks a prospective application of a statutory change.

Since Quill has not collected or remitted any state use taxes, this particular case does not present the issue of unconstitutionally collected taxes. Thus, it is difficult to imagine the circumstances under which retroactive application could be an issue. However, if it could, the state court must first be allowed to rule on the question. *See*

McKesson Corp., 110 S. Ct. at 2258 ("[t]he State is free to choose which form of relief it will provide, so long as that relief satisfies the minimum federal requirements we have outlined.").

Nevertheless, the retroactivity issue presented to this Court by Quill was not raised, argued, briefed, or decided below. By not specifying the stage in the proceedings at which the issue was raised and by not quoting portions of the record where the issue appears, Quill has failed to comply with Supreme Court Rule 14.1(h). Quill cannot comply with Rule 14.1(h) because there are no references to this issue in the record.

For these reasons, Quill's second question presented is not properly before this Court.

CONCLUSION

While it is unusual for the winning party to agree that granting a writ of certiorari is appropriate, the State of North Dakota believes that early resolution by this Court of the issue presented in the petition, as restated in this response, is in the State's best interests. North Dakota, therefore, respectfully requests that the Court grant certiorari on the first question presented as reformulated in this response and deny certiorari on Quill's second question presented.

Dated: September 3, 1991.

Respectfully submitted,

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No. 91-194

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

QUILL CORPORATION,
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v.
STATE OF NORTH DAKOTA,
BY AND THROUGH ITS TAX COMMISSIONER,
HEIDI HEITKAMP,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of North Dakota

BRIEF AMICUS CURIAE OF THE DIRECT MARKETING ASSOCIATION IN SUPPORT OF THE PETITION FOR CERTIORARI AND IN SUPPORT OF SUMMARY REVERSAL

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QUESTION PRESENTED

Whether the North Dakota Supreme Court is obligated to follow the longstanding precedent of *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), in a case that is factually indistinguishable from *Bellas Hess*?

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BRIEF AMICUS CURIAE OF THE DIRECT MARKETING ASSOCIATION IN SUPPORT OF THE PETITION FOR CERTIORARI AND IN SUPPORT OF SUMMARY REVERSAL

STATEMENT OF INTEREST *

The Direct Marketing Association ("DMA"), a not-for-profit corporation, is the oldest and largest national trade association representing direct marketers and advertisers. DMA's membership—ranging from the very smallest "mom and pop" operations to "Fortune 500" companies—includes more than 3,200 firms located in all 50 states and 40 foreign countries. A majority of DMA's members are mail order companies which conduct interstate business

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* Counsel for all parties have consented to the filing of this amicus brief. *Amicus* has filed those consents with the Clerk of this Court pursuant to Sup. Ct. R. 37.2.

—sending catalogs and other advertising materials throughout the United States by mail, receiving orders for goods by mail or by telephone, and delivering goods to customers by interstate common carriers. Thus, DMA has a unique interest in the development of the law governing taxation of interstate mail order companies and a particular concern that states and local governments comply with the constitutional requirements articulated by this Court in *National Bellas Hess, Inc. v. Dep't of Revenue*, 386 U.S. 753 (1967). There this Court held that states may not impose use tax collection duties on out-of-state mail order companies unless the companies have a physical nexus with the taxing state. The decision below is admittedly at odds with *Bellas Hess* and is based entirely on the view that *Bellas Hess* is no longer good law. If not reversed by this Court, the decision of the North Dakota Supreme Court will spawn further confusion and conflict, and will encourage other state courts to disregard this Court's governing precedents.

For nearly a quarter of a century, states, businesses, and consumers have ordered their affairs based on the principles articulated by this Court in *Bellas Hess*. If North Dakota is dissatisfied with that decision, there is a clear remedy. As the Court pointed out in *Bellas Hess* itself, "this is a domain where Congress alone has the power of regulation and control." 386 U.S. at 760. Congress has the authority to fashion uniform rules in this area which would obviate the constitutional objections and take account of both the states' interests and those of the direct marketing companies.

ARGUMENT

Last Term in *Connecticut Commissioner of Revenue Services v. SFA Folio Collections, Inc.*, No. 90-1627, 111 S.Ct. 2839 (1991), the State of Connecticut urged that this Court grant certiorari to consider whether it should overrule its long-standing decision in *National Bellas Hess, Inc. v. Dep't of Revenue*, 386 U.S. 753 (1967). Review by this Court was said to be appropriate because of a conflict between the decision of the Supreme Court of Connecticut in *Folio* and the decision of the North Dakota Supreme Court in this case.[1] This Court denied certiorari, Justices White and Blackmun dissenting.

The petition here again seeks plenary review based on the same conflict.[2] Such plenary consideration is no more appropriate here than in *Folio*. But, in view of the clearly erroneous result reached by the court below, the appropriate course here is summary reversal rather than denial of certiorari.

I. THE NORTH DAKOTA COURT FAILED TO FOLLOW THIS COURT'S DECISION IN *BELLAS HESS* AND TO PERFORM ITS DUTY UNDER THE SUPREMACY CLAUSE

The North Dakota Supreme Court determined that this Court's decision in *Bellas Hess* is "obsolescent," and therefore is not binding on the courts of North Dakota.

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[1] 111 S.Ct. 2839. In that case, the Connecticut court based its decision on *Bellas Hess* (*see SFA Folio Collections, Inc. v. Bannon*, 585 A.2d 666, 670-71 (Conn. 1991)), and in his petition for certiorari, the Connecticut Commissioner urged that the Supreme Court reconsider the validity of *Bellas Hess*. *See* Petition for Writ of Certiorari, *Commissioner of Revenue Services v. SFA Folio Collections, Inc.*, No. 90-1627 at 7 (1991). *See also Cally Curtis Co. v. Groppo*, 572 A.2d 302 (Conn.), *cert. denied*, 111 S.Ct. 77 (1990) (refusal to review another decision based on *Bellas Hess* despite petitioner's request that this Court reconsider its decision).

[2] *See* Petition for Certiorari at 19-20 ("Pet.").

Pet. App. A10. It followed, said the court below, that North Dakota can impose use tax collection duties on an out-of-state mail order company with no physical presence in the State.

Contrary to the North Dakota court's analysis, no legal or factual change has undermined the principles of *Bellas Hess*. Despite the North Dakota court's protestations, this Court has never doubted *Bellas Hess*, and its rulings have consistently followed *Bellas Hess* since 1967. Under the Supremacy Clause,[3] the North Dakota courts must follow this Court's precedents.

A. Under *Bellas Hess* and an Unbroken Line of Supreme Court Precedent, a State Cannot Impose Use Tax Collection and Payment Obligations on an Out-of-State Mail Order Company with No Physical Presence in the State

In *Bellas Hess*, this Court held that states may not constitutionally require an out-of-state seller to collect use tax on mail order sales to residents of a state in which the seller's only contacts are by mail or common carrier. The Court found that such interstate contacts could not create a connection, or "nexus," sufficient to support the imposition of use tax collection obligations without violating the Commerce Clause and the Due Process Clause of the Fourteenth Amendment. In reaching this result, this Court formulated the appropriate test for nexus by focusing on the seller's physical presence, *i.e.*, "retail outlets, solicitors, or property," within the taxing state. *Bellas Hess*, 386 U.S. at 758.

This Court concluded that allowing Illinois to impose use tax collection and payment obligations on the out-of-state mail order seller would create "unjustifiable local entanglements" of interstate commerce. *Bellas Hess*, 386 U.S. at 760. "The many variations in rates of tax, in allowable exemptions, and in administrative and record-keeping requirements could entangle National [Bellas

[3] U.S. Const. art. VI, cl. 2.

Hess'] interstate business in a virtual welter of complicated obligations to local jurisdictions . . . ." *Id.* at 759-60 (footnotes omitted).

The North Dakota Supreme Court here conceded that *Bellas Hess* was directly on point (*see* Pet. App. A5), but nevertheless asserted "that the foundational basis of *Bellas Hess* has been eroded and that the Supreme Court would so conclude." Pet. App. A13.[4] In support of its extraordinary conclusion that this Court has abandoned *Bellas Hess*, the North Dakota court cited no decision of this Court rejecting the result in *Bellas Hess*, nor even an opinion questioning its reasoning. Rather, the court quoted liberally from then-Justice Fortas' dissent in *Bellas Hess* itself and concluded that the dissent accurately "forecast" the diminished value of that precedent. Pet. App. A7-A9.

Contrary to the North Dakota Supreme Court's reasoning, this Court has never wavered in its adherence to *Bellas Hess*: that decision remains the benchmark for determining whether sufficient nexus exists to allow a state to impose tax collection and payment obligations on an interstate business consistent with the Commerce Clause and Due Process Clause.[5]

The North Dakota court urged that the "obsolescen[ce]" of *Bellas Hess* was most clearly demonstrated by the "striking shift in the Court's position on taxation of interstate commerce . . . in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977)." Pet. App. A13. There this Court announced a four-part test for

[4] In contrast, the North Dakota District Court recognized the continuing validity of *Bellas Hess* and held the application of the tax to Quill unconstitutional. *See* Pet. App. A38-A42, A5.

[5] *See National Geographic Society v. California Bd. of Equalization*, 430 U.S. 551, 559 (1977); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 626 (1981); *D.H. Holmes v. McNamara*, 486 U.S. 24, 33 (1988); *Goldberg v. Sweet*, 488 U.S. 252, 263 (1989).

invalidating state tax laws under the Commerce Clause.[6] *Complete Auto* continued to require a showing of "substantial nexus," and this Court on at least four occasions since the decision in *Complete Auto* has reaffirmed *Bellas Hess* and made clear that it is entirely consistent with the *Complete Auto* decision.

One month after the decision in *Complete Auto*, this Court in *National Geographic Society v. California Bd. of Equalization*, 430 U.S. 551 (1977), applied the physical presence test to determine nexus and rejected a claim that the "slightest presence" in the state was sufficient. *Id.* at 556. In doing so the Court reaffirmed *Bellas Hess*' "careful[] underscor[ing of] . . . the 'sharp distinction . . . between mail order sellers with retail outlets, solicitors, or property within [the taxing] State, and those [like *Bellas Hess*] who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business.'" *Id.* at 559 (quoting from *Bellas Hess*, 386 U.S. at 758.

In *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981), this Court noted that *Bellas Hess* is the touchstone of the first prong of *Complete Auto*: "Under this threshold test, the interstate business must have a substantial nexus with the State before *any* tax may be levied on it. *See National Bellas Hess, Inc. v. Illinois Revenue Dep't*, 386 U.S. 753 (1967)." *Commonwealth Edison*, 453 U.S. at 626 (emphasis in original). In 1988, this Court unanimously reaffirmed its *Bellas Hess* holding in *D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 33 (1988):

> In *National Bellas Hess*, we held that the State of Illinois could not, consistently with the Commerce Clause, compel an out-of-state mail order company to collect a use tax on purchases of goods by Illinois residents when the seller's only connection with its Illinois customers was by mail or common carrier.

See Pet. at 13.[7]

Finally, in *Goldberg v. Sweet*, 488 U.S. 252 (1989), this Court again relied on *Bellas Hess* as the benchmark for measuring sufficient taxing nexus. Discussing a Commerce Clause challenge to the taxation of interstate telecommunications, this Court noted, "We also doubt that termination of an interstate telephone call, by itself, provides a substantial enough nexus for a State to tax a call. *See National Bellas Hess, Inc. v. Department of Revenue of Illinois*, 386 U.S. 753 (1967) (receipt of mail provides insufficient nexus)." *Goldberg*, 488 U.S. at 263. Thus, the very cases upon which the North Dakota Supreme Court relied as undermining *Bellas Hess* (*see* Pet. App. A13-A24) themselves reaffirmed the *Bellas Hess* decision.[8]

[6] Under that test, a state tax will be invalidated unless "the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." 430 U.S. at 279.

[7] The North Dakota Supreme Court suggested that in *Holmes* "the Court chose to stress economic presence, the phraseology of the *Bellas Hess* dissent." Pet. App. A17. In fact, this Court in *Holmes* did no such thing. Rather it relied on physical presence within the state. *D.H. Holmes*, 486 U.S. at 32-33.

[8] The court below also relied on *Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232 (1987) and *Standard Pressed Steel v. Washington Dep't of Revenue*, 419 U.S. 560 (1975), as undermining *Bellas Hess*. Those cases did not do so directly or by implication. *Tyler Pipe* upheld taxing jurisdiction because the taxpayer's employee resided in the State and performed substantial activities on the taxpayer's behalf there. Thus, the taxpayer maintained a significant physical presence in the State. In *Standard Pressed Steel*, this Court similarly upheld imposition of the State's business and occupation tax on a company because its employee had "a full-time job within the State . . . ." 419 U.S. at 562.

The North Dakota court additionally relied on personal jurisdiction cases (Pet. App. A19-A21) that exclusively address the due process concerns that limit a state's exercise of *personal* jurisdiction over a nonresident. The North Dakota court failed to note

This conclusion that *Bellas Hess* is still good law is demonstrated not only by this Court's own decisions, but also by the overwhelming number of lower federal and state courts that have acknowledged the continuing vitality of *Bellas Hess*.[9] Recognizing the fact that *Bellas*

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that this Court in *Bellas Hess* refused to adopt a standard fashioned from these personal jurisdiction cases. In *Bellas Hess*, the State directly urged the Court to adopt the economic presence test that had already been applied in personal jurisdiction cases for at least ten years. *See* Brief for Appellee at 32-34, *Bellas Hess*, 386 U.S. 753 (O.T. 1966, No. 241).

[9] *See, e.g., Direct Marketing v. Bennett*, No. Civ. S-88-1067 (E.D. Cal. July 12, 1991) (1991 U.S. Dist. LEXIS 10736) (*Bellas Hess* prohibits California from imposing use tax collection obligations on direct marketers based solely on solicitation in the State and acceptance of credit cards issued by California financial institutions); *Alaska Airlines, Inc. v. Dep't of Revenue*, 769 P.2d 193, 198 (Or. 1989), *cert. denied*, 110 S.Ct. 717 (1990) (noting that *Bellas Hess* comprises first prong of *Complete Auto* test); *Burke & Sons Oil Co. v. Director of Revenue*, 757 S.W.2d 278, 280 (Mo. App. 1988) (*Bellas Hess* establishes that "[m]erely communicating with customers in a state by mail or common carrier as part of a general interstate business does not create a sufficient nexus"); *Good's Furniture House, Inc. v. Iowa State Bd. of Tax Review*, 382 N.W.2d 145, 150 (Iowa), *cert. denied*, 479 U.S. 817 (1986) (state tax must meet nexus test articulated in *Miller Bros. v. Maryland*, 347 U.S. 340 (1954), and refined by *Bellas Hess* and *National Geographic*); *Avco Financial Serv. Consumer Discount Co. One, Inc. v. Director Div. of Taxation*, 494 A.2d 788, 795 (N.J. 1985) (distinguishing *Bellas Hess* on ground of "distinctive contacts" with the State: "Unlike the mail order house in *National Bellas Hess*, or the department store in *Miller Brothers*," this seller "entered the taxing state to dun its customers," used "affiliated in-state offices for customers to drop payments," used the State's credit service agencies, and "invoked the State's process to enforce its contracts"); *National Meat Ass'n v. Deukmejian*, 743 F.2d 656, 658 n.1 (9th Cir. 1984), *aff'd*, 469 U.S. 1100 (1985) (comparing *National Geographic* and *Bellas Hess*, noting that factor establishing nexus in *National Geographic* was maintenance of offices in state); *Evanston Ins. Co. v. Merin*, 598 F. Supp. 1290, 1305 (D.N.J. 1984) (*Bellas Hess* is the "leading case defining the minimal connection required between an out-of-state business and a state before the state may impose tax liability," and "critical threshold" for triggering the

Hess controls lower courts' inquiry into the constitutionality of states' attempts to tax out-of-state mail order houses, these courts have applied *Bellas Hess* to invalidate states' imposition of use tax collection obligations on businesses which lack a physical presence in the state.[10] Just within the last five months, two state supreme courts have invalidated their states' attempts to impose use tax collection duties on businesses that do not have a physical presence in the state. *See SFA Folio Collections, Inc. v. Bannon*, 585 A.2d 666 (Conn.), *cert. denied sub nom. Commissioner of Revenue Services v. SFA Folio Collections, Inc.*, 111 S.Ct. 2839 (1991); *Bloomingdale's By Mail, Ltd. v. Dep't of Revenue*, 591 A.2d 1047 (Pa. 1991), *aff'g* 567 A.2d 773 (Pa. Commw. Ct. 1989) (per curiam). And most recently, a federal district court invalidated California's attempt to impose use tax collection obligations on direct marketing companies with no physical presence in that State. *Direct Marketing v. Bennett*, No. Civ. S-88-1067 (E.D. Cal. July 12, 1991) (1991 U.S. Dist. LEXIS 10736).[11]

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power to tax is whether company "stations agents or establishes offices to conduct any business in the taxing state." *Id.* at 1306); *Illinois Commercial Men's Ass'n v. State Bd. of Equal.*, 671 P.2d 349, 355 (Cal. 1983), *app dism'd*, 466 U.S. 933 (1984) (presence of agents in State formed "definite link" and "minimum connection" required to justify imposition of gross premium tax); *Boswell v. Paramount Television Sales, Inc.*, 282 So. 2d 892, 897 (Ala. 1973) (emphasizing that *Bellas Hess* requires physical presence).

[10] *See, e.g., SFA Folio Collections, Inc. v. Bannon*, 585 A.2d 666 (Conn.), *cert. denied sub nom. Commissioner of Revenue Services v. SFA Folio Collections, Inc.*, 111 S.Ct. 2839 (1991); *Cally Curtis Co. v. Groppo*, 572 A.2d 302 (Conn.), *cert. denied*, 111 S.Ct. 77 (1990); *Bloomingdale's By Mail, Ltd. v. Dep't of Revenue*, 591 A.2d 1047 (Pa. 1991), *aff'g* 567 A.2d 773 (Pa. Commw. Ct. 1989) (per curiam); *L.L. Bean, Inc. v. Commonwealth of Pennsylvania*, 516 A.2d 820 (Pa. Commw. Ct. 1986); *Book-of-the-Month Club, Inc. v. Porterfield*, 268 N.E.2d 272, 274 (Ohio 1971).

[11] Use tax legislation proposed in both the 100th and the 101st Congress, as well as accompanying congressional hearings, also

No feature of this case distinguishes it from *Bellas Hess*; indeed, the North Dakota court's holding bears a striking resemblance to the decision of the Illinois Supreme Court in *Bellas Hess*, which this Court reviewed and reversed.[12] The North Dakota Supreme Court urged that it could not "ignore the tremendous social, economic, commercial and legal innovations since 1967 . . . ." Pet. App. A10. The court pointed to increased volume of mail order business, finding that to be "the greatest change in mail order since 1967 . . . ." Pet. App. A12.

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reflect the states' acknowledgement of a lack of authority to alter the mandates of *Bellas Hess*. *See Interstate Sales Tax Collection Act of 1987 and the Equity in Interstate Competition Act of 1987: Hearings on H.R. 1242, H.R. 1891, and H.R. 3521 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 100th Cong., 2d Sess. 362 (1988) (noting the involvement of the National Association of Counties, the National Conference of State Legislators, the National Governors' Association, the National League of Cities, and the United States Conference of Mayors) (*"Hearings on H.R. 1242, H.R. 1891 and H.R. 3521"*). *See also* H.R. 2230, 101st Cong., 1st Sess., 135 Cong. Rec. H1662 (daily ed. May 4, 1989); S. 480, 101st Cong., 1st Sess., 135 Cong. Rec. 1918 (daily ed. March 1, 1989); H.R. 3521, 100th Cong., 1st Sess., 133 Cong. Rec. 28619 (1987); H.R. 1891, 100th Cong., 1st Sess., 133 Cong. Rec. 7727 (1987); H.R. 1242, 100th Cong., 1st Sess., 133 Cong. Rec. 4087 (1987); S1099, 100th Cong., 1st Sess., 133 Cong. Rec. 10108 (1987); S. 639, 100th Cong., 1st Sess., 133 Cong. Rec. 4587 (1987).

[12] The Illinois court's holding was premised on the State's alleged authority to assert taxing jurisdiction based solely on continuous solicitation. *See Department of Revenue v. National Bellas Hess, Inc.*, 214 N.E.2d 755, 759 (Ill. 1966), *rev'd*, 386 U.S. 753 (1967) ("[t]he important question is whether there is 'exploitation of the consumer market' by continuous solicitation and not whether the company used local advertising, salesmen, brokers or catalogues . . . ."). This argument was repeated by the Illinois Commissioner of Revenue before this Court. Brief for Appellee at 7-9, 18, *Bellas Hess*, 386 U.S. 753 (O.T. 1966, No. 241) (State argued that sufficient nexus exists when seller "in a systematic and continuous aggressive manner exploited the Illinois consumer market" by soliciting sales through catalog distribution).

The court below also noted that there were new methods for ordering goods, including "toll-free telephone lines, fax orders, and direct computer ordering," and the new methods for delivery of such goods, including "advances in the parcel delivery industry . . . including overnight delivery." *Id.* But neither the actual volume of sales nor the use of new methods of interstate communications can alter the constitutional principles. The Court in *Bellas Hess* implicitly recognized that the constitutional rule announced in that case cannot fluctuate with quantitative factors such as sales volume or the size of the mail order industry.[13]

Despite the assertions of the court below, there is also nothing "new" in the mail order industry that affects this Court's constitutional analysis of the burden imposed upon mail order companies by the collection of out-of-state use taxes. While computers might make it easier for mail order firms to calculate the tax due to each jurisdiction, profound administrative burdens still remain,[14] and "[o]n

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[13] Although the Court was clearly aware that the sizable number of mail order sales at issue in 1967 would increase in coming years (*see Bellas Hess*, 386 U.S. at 764 (Fortas, J., dissenting), the size of the industry itself did not affect the Court's constitutional analysis. It is likewise irrelevant here.

The North Dakota court's emphasis on a change in the "sheer volume" of the mail order industry also overlooks the very substantial character of the mail order business directly at issue in *Bellas Hess*. In *Bellas Hess* nearly twice as much sales volume was at issue. *Cf. Bellas Hess*, 386 U.S. at 761 (Fortas, J., dissenting) (Bellas Hess' sales to Illinois residents in the fifteen month period at issue in that case totalled $2,174,744) *with State by Heitkamp v. Quill Corp.*, 470 N.W.2d 203, 204 (N.D. 1991) (Quill's annual sales to residents in North Dakota are "just under $1,000,000").

[14] *See, e.g., Collection of State Sales and Use Taxes by Out-of-State Vendors: Hearing on S. 593 and S. 1099 Before the Subcomm. on Taxation and Debt Management of the Senate Comm. on Finance*, 100th Cong., 1st Sess. 52 (1987) (*"Hearing on S. 639 and S. 1099"*) (testimony of Alan Glazer). Witnesses have noted that computer tax programs are not equipped to recognize tax

average, mail-order companies bear six or seven times the collection costs of in-state retailers who can collect sales tax at the cash register." Note, *Collecting the Use Tax on Mail Order Sales*, 79 Geo. L.J. 535, 541 (1991).[15] Far from receding wtih the passage of time, the compliance burdens on out-of-state mail order companies have actually grown.[16] In 1967, this Court noted that it

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exemptions for products, which vary from jurisdiction to jurisdiction, nor can such programs judge whether products fit within a given exemption. *See, e.g., Interstate Sales Tax Collection Act of 1987: Hearing on H.R. 1242 Before the Subcomm. on Select Revenue Measures of the House Comm. on Ways and Means*, 100th Cong., 1st Sess. 178 (1987) (testimony of Heath Kline); *Hearing on S. 639 and S. 1099* at 53 (testimony of Robert Levering).

[15] Collection obligations are still much more burdensome on mail order companies than on local retailers. Many customers still pay for mail order or merchandise by check and money order, and often make mistakes in calculating tax. *Hearings on H.R. 1242, H.R. 1891 and H.R. 3521* at 207 (testimony of William T. End). When mistakes occur, the mail order company must either pay the tax itself or bill the customer for the additional tax. Even the computer tax programming industry itself admits that this burden cannot be lifted by computer technology. *Hearing on S. 639 and S. 1099* at 206 (letter from Ray Westphal, President Vertex Systems).

[16] The *Bellas Hess* Court noted that in 1965, "over 2,300 localities" imposed local sales tax (*Bellas Hess*, 386 U.S. at 759 n.12); today, approximately 6,500 jurisdictions have the statutory authority to impose sales and use taxes. *See*, Note, *Collecting the Use Tax on Mail Order Sales*, 79 Geo. L.J. 535, 539 (1991). Today as in 1967, "[h]ardly two States provide identical exemptions," Brief for Appellant at 26-27, *Bellas Hess*, 386 U.S. 753, (O.T. 1966, No. 241), but now, because of the growth in taxing jurisdictions, the exemption burden has grown almost threefold. And aside from the enormous recordkeeping and record production requirements, the growth in the number of taxing jurisdictions raises the specter of nearly perpetual audits. *Interstate Sales Tax Collection Act of 1987: Hearing on H.R. 1242 Before the Subcomm. on Select Revenue Measures of the House Comm. on Ways and Means*, 100th Cong., 1st Sess. 31-32 (1987) (colloquy between Rep. Judd Gregg and Deputy Assistant Secretary of the Treasury O. Donaldson

must prohibit Illinois' imposition of use tax collection obligations on National Bellas Hess because otherwise, the "many variations in rates of tax, in allowable exemptions, and in administrative and recordkeeping requirements . . . could entagle National [Bellas Hess'] interstate business in a virtual welter of complicated obligations to local jurisdictions . . . ." *Bellas Hess*, 386 U.S. at 759-60. That is clearly still the case.

Finally, North Dakota and other states address their arguments to the wrong forum when they express continued dissatisfaction with their inability to force out-of-state companies with no physical presence in their states to collect use tax on goods purchased by their states' consumers. This Court in *Bellas Hess* specifically noted (*id.* at 760) that Congress has authority to fashion an equitable and forward-looking system for the collection of state use tax by out-of-state sellers that would avoid upsetting the settled expectations of the parties and reduce the burdens and inequities that individual state local collection efforts would impose.[17] Congress is well aware of the claims of the state taxing authorities: in recent years numerous bills have been introduced to achieve legislatively the goal that the State seeks here.[18] While there is

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Chapoton). *Cf.*, Brief for Appellant at 27-28, *Bellas Hess*, 386 U.S. 753, (O.T. 1966, No. 241).

[17] *See L.L. Bean, Inc. v. Commonwealth of Pennsylvania*, 516 A.2d 820 (Pa. Commw. Ct. 1986). In *Bean*, the court noted the State's frustration with the limitations imposed on state action by *Bellas Hess*, but explained, "[T]his problem, which is one of national concern, is more properly dealt with by Congress than by judicial lawmaking. Until legislative action is taken, *National Bellas [Hess]* and *Miller Brothers* represent the current state of the law and we are bound by them." *Id.* at 826-27.

[18] *See, e.g.*, S. 2368, 100th Cong., 2d Sess. (1988); H.R. 3521, 100th Cong., 1st Sess. (1987); H.R. 1891, 100th Cong., 1st Sess. (1987). Hearings have been conducted on a number of legislative proposals. *See, e.g., State Taxation of Interstate Commerce: Hearing on S. 1510 Before the Subcomm. on Taxation and Debt*

debate about the form that such legislation should take, some of these proposals would seek to address the substantial compliance burdens for out-of-state mail order firms and their customers by establishing a uniform national rate of tax, an adequate collection allowance, uniform national definitions of exempt items, a uniform tax treatment of shipping and handling charges and a single filing and audit procedure.[19]

B. The North Dakota Court Neglected Its Duty Under the Supremacy Clause To Apply *Bellas Hess* and Invalidate the North Dakota Use Tax Statute

Obviously, the North Dakota court has misunderstood its duty under the Supremacy Clause. When a question of federal right is submitted to a state court, it is the duty of that court "to administer the law prescribed by the Constitution . . . as construed by this Court." *South Carolina v. Bailey*, 289 U.S. 412, 420 (1933).[20] This is so even in areas when, unlike the present situation, some doubt exists as to whether this Court would adopt the approach

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Management of the Senate Comm. on Finance, 99th Cong., 1st Sess. (1985); *Interstate Sales Tax Collection Act of 1987: Hearing on H.R. 1242 Before the Subcomm. on Select Revenue Measures of the House Comm. on Ways and Means*, 100th Cong., 1st Sess. (1987); *Hearings on S. 639 and S. 1099; Hearings on H.R. 1242, H.R.1891 and H.R. 3521.*

[19] *See, e.g.*, Committee on State Taxation of the Counsel of State Chambers of Commerce, *COST Endorses Compromise on Bellas Hess Legislation*, State Tax Report No. 244 at 1 (Dec. 15, 1989).

[20] *See also, e.g., Cooper v. Aaron*, 358 U.S. 1, 18 (1958) ("The federal judiciary is supreme in the exposition of the law of the Constitution"); *Henry v. City of Rock Hill*, 376 U.S. 776, 777 n. (1964) (a Supreme Court decision interpreting the Federal Constitution, "under the Supremacy Clause, is binding upon state courts as well as upon federal courts"); *Chesapeake & Ohio Ry. v. Martin*, 283 U.S. 209, 221 (1931) (determination of a federal question by the Supreme Court "is binding upon the state courts and must be followed, any state law, decision, or rule to the contrary notwithstanding").

as an initial matter. As this Court has explained, "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). "A different principle would lead to the most mischievous consequences. The courts of the several States might determine the same questions in different ways. There would be no uniformity of decisions." *The Mayor v. Cooper*, 73 U.S. (6 Wall.) 247, 253 (1867). The premise of the North Dakota Supreme Court's approach was that if there were doubt as to the continued validity of *Bellas Hess*, the statute would necessarily have to be upheld because "[a]ny doubt must be resolved in favor of the constitutionality of the statute." Pet. App. A27. Here the North Dakota Supreme Court has mistaken its role. It was obligated to apply the controlling principles of *Bellas Hess*, and its failure to do so marks a significant departure from the appropriate role of a subordinate court.

II. THIS COURT SHOULD SUMMARILY REVERSE THE NORTH DAKOTA SUPREME COURT'S DECISION

In view of the North Dakota court's failure to follow controlling precedent, the Court should grant certiorari and summarily reverse (*see* Sup. Ct. R. 16.1), as it has done in the past in similar circumstances. In *Thurston Motor Lines v. Jordan K. Rand, Ltd.*, 460 U.S. 533 (1983) (per curiam), for example, a panel of the Ninth Circuit refused to follow a sixty-five year old precedent of this Court,[21] " 'doubt[ing] that [the precedent was] still good law.' " *Id.* at 535 (quoting Ninth Circuit opinion). This Court reversed and remanded the case, commenting,

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[21] *Louisville & Nashville R.R. v. Rice*, 247 U.S. 201 (1918).

"Needless to say, only this Court may overrule one of its precedents. Until that occurs, [the precedent] is the law, and the decision below cannot be reconciled with it." This Court has also granted summary reversal in numerous other cases in which controlling precedent has been ignored by the lower courts.[22]

The State also argued below that the presence of *Quill's* licensed computer programs within the state established a sufficient physical presence under *Bellas Hess*, and the North Dakota Supreme Court relied on the fact that "[t]hrough its licensing agreement [for computer software to North Dakota's customers] Quill clearly retains right to property situated in North Dakota providing further nexus with the State." Pet. App. A29-A30. We agree with petitioner that such minimal contacts with the state are irrelevant for purposes of the *Bellas Hess* analy-

[22] *See, e.g., Delo v. Stokes*, 110 S.Ct. 1880 (1990) (per curiam) (reversing federal court decision for failure to follow *Barefoot v. Estelle*, 463 U.S. 880 (1983), which held that a second or successive federal habeas petition should be granted only where there are substantial grounds upon which relief may be granted); *Smith v. Ohio*, 110 S.Ct. 1288 (1990) (per curiam) (reversing state court judgment for failure to follow, *inter alia*, *Johnson v. United States*, 333 U.S. 10 (1948), and *Sibron v. New York*, 392 U.S. 40 (1968), holding that police cannot use an incident search to justify an ensuing arrest); *Powell v. Texas*, 492 U.S. 680 (1989) (per curiam) (reversing state court judgment for failure to follow *Estelle v. Smith*, 451 U.S. 454 (1981), establishing a defendant's right to be informed before a psychiatric examination concerning future dangerousness that he has a right to remain silent and that anything he says can be used against him at his sentencing proceeding); *Olden v. Kentucky*, 488 U.S. 227 (1988) (per curiam) (reversing and remanding state court judgment for failure to follow *Davis v. Alaska*, 415 U.S. 308 (1974), establishing a right to conduct reasonable cross-examination); *City of Newport v. Iacobucci*, 479 U.S. 92 (1986) (per curiam) (reversing and remanding a federal court decision for failure to follow *New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981) (per curiam), allowing states to prohibit nude dancing in establishments that sell liquor).

sis,[23] and summary reversal is appropriate on this issue as well. Alternatively, this Court may wish to reverse and remand so that the state court can reconsider its decision under a proper constitutional standard.[24] Under either procedural alternative, it is imperative that this Court not permit its precedent, upon which an entire industry has relied for the past quarter century, to be ignored by state courts responsible for applying federal constitutional principles. To do so would be to invite similar conduct by other state revenue departments and state courts, with the resulting confusion and erosion of established constitutional doctrine.

[23] In *Cally Curtis Co. v. Groppo*, 572 A.2d 302 (Conn.), *cert. denied*, 111 S.Ct. 77 (1990), the Connecticut Supreme Court rejected the contention that the presence in the state of tapes rented by Cally Curtis to Connecticut business was sufficient for nexus purpose.

[24] *See, e.g., Palmer v. BRG of Georgia, Inc.*, 111 S.Ct. 401, 403 n.7 (1990) (reversing and remanding on the ground that the federal court below failed to apply *United States v. Topco Assocs. Inc.*, 405 U.S. 596 (1972)).

The North Dakota Supreme Court rejection of *Bellas Hess* was clearly a predicate to its entire decision. See Pet. App. A13.

CONCLUSION

The petition for a writ of certiorari should be granted, and the North Dakota Supreme Court's decision should be summarily reversed.

Respectfully submitted,

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No. 91-194

IN THE
SUPREME COURT OF
THE UNITED STATES
OCTOBER TERM, 1991

QUILL CORPORATION,

Petitioner,

-against-

STATE OF NORTH DAKOTA,
by and through its Tax Commissioner,
HEIDI HEITKAMP,

Respondent.

BRIEF OF THE CITY OF NEW YORK AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF THE AMICUS CURIAE

Pursuant to Rule 37.5, the City of New York, as a political subdivision of the State

of New York, is exercising the right to file a brief amicus curiae in response to the petition for certiorari.

The City of New York has, in addition to the State's own sales tax of 4%, a similar sales tax for its own benefit. At present the tax is imposed and collected by the State. The collected money goes to the State Comptroller and, after deductions for expenses, to a Munincipal Assistance Corporation for the City. After deducting amounts needed to pay obligations incurred for the City, the remainder goes to the City. Thus, any reduction in the amount which may be collected as sales tax or use tax reduces the City's income. New York Laws 1975, ch. 168, §§2, 3, 7.

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED IN ORDER TO ALLOW RECONSIDERATION OF THE DECISION IN NATIONAL BELLAS HESS v. ILLINOIS DEPARTMENT OF REVENUE, 386 U.S. 753 (1967).

The City of New York, as amicus curiae, urges the Court to grant certiorari and then to affirm the decision of the North Dakota Supreme Court under review. In doing so, it may be necessary to distinguish or even to repudiate the holdings in National Bellas Hess v. Illinois Department of Revenue, 386 U.S. 753 (1967), and related cases, insofar as they permit out-of-state mail order vendors to avoid state and local sales/use tax withholding requirements.

We submit that those rulings rest on an artificial constitutional analysis that frustrates the states' substantial and legitimate interests in collection of revenue

and in the integrity of their domestic retail markets. Instead of protecting interstate commerce, they give such commerce an unfair advantage over local commerce.

Bellas Hess and related decisions considered the constitutional requirements for a state (or political subdivision) to subject an out-of-state vendor to its sales/use tax withholding statutes. The state sales/use taxes, in general and as relevant here, are imposed on a vendee of retail merchandise who is a resident of the taxing state and who either purchases the merchandise within the state or purchases it outside the state for use within the state. The amount of tax is a specified percentage of the sales price. The state typically requires that the vendor collect the correct amount of tax from the vendee and remit such amount, with appropriate reports, to the state. This Court has

recognized that the cooperation of the vendor is indispensable to collection of the sales/use tax. National Geographic v. California Equalization Board, 430 U.S. 551, 555 (1976). The sales/use taxes are a vital source of revenue in most states.

Bellas Hess and its progeny hold that an out-of-state vendor may be subject to the sales/use tax withholding requirement only if it engages in business activity within the taxing jurisdiction through local employees or agents or if it maintains property therein. An out-of-state vendor whose marketing activities within the jurisdiction consist solely of advertising and the mailing of catalogs to residents, and who fills the resulting orders by mail or common carrier, but who has no employees, agents or tangible property within the taxing jurisdiction, cannot be required, under these cases, to collect the sales/use

tax. It was not significant, in the reasoning of this Court in Bellas Hess and other decision, that the vendor may purposefully and specifically direct its marketing activities to residents of the taxing jurisdiction or that its resulting sales within the jurisdiction are continuous and substantial. The effect of this requirement for a tangible "nexus" is that only businesses which are already subject to the full scope of the state's taxing power may be required to comply with the sales/use tax statutes.

Bellas Hess begins its analysis by characterizing the sales/use tax withholding requirement as a tax "exaction". 386 U.S. at 756. Since the State is deemed to be imposing a "tax" on the vendor, it follows that the State must demonstrate that it is providing services and protections of a value commensurate

with the purported exaction. But, since the out-of-state vendor has no tangible "presence" in the state, it may not, under the Court's decisions, qualify as a beneficiary of the taxing state's governmental benefits and protections. For this reason, Bellas Hess concluded that there is no constitutional basis for the state to exact compliance with its withholding requirements.

There are two important respects in which the Bellas Hess analysis departs from economic reality. The first is in treating the sales/use tax withholding requirement as if it were a tax imposition. In an economic sense, it is no such thing. Clearly, it is the vendee who bears the entire tax burden imposed on any retail transaction. As to the vendor, this Court has recognized that "the sole burden imposed upon the out-of-state seller by

[the sales/use tax withholding requirement] is the administrative one of collecting it." National Geographic v. California Board of Equalization, supra, 430 U.S. at 558. With modern computer technology, the economic impact of this "administrative" burden must be regarded as so de minimis as to be of no substantial constitutional significance.

Economic reality demands that the withholding requirement be regarded not as a tax, but rather as a legal duty on the part of the vendor to comply with the reasonable tax administration laws of the jurisdictions which are the targets of such vendor's deliberate and purposeful marketing activities. Such a duty of compliance rests on the equitable consideration that an out-of-state business should not be permitted to enhance its position in the market place through the opportunities for tax evasion afforded to

local vendees. Viewed in this light, the withholding requirement is analogous to other legal duties properly imposed by the states on out-of-state businesses which lack tangible local "presence", but which "purposefully" direct their activities to local residents. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472-73 (1985).

In this category, this Court has recognized the duty to use reasonable care in the design and manufacture of products placed in the stream of commerce, and to conform to state laws regarding such matter as defamation and contractual obligations. Id. Such duties attach whenever an out-of-state business has "purposefully directed its activities at residents of the forum." Id. Similarly, the proper standard for determination of whether a business should be subject to a state's sales/use tax withholding requirements should be the

foreseeability that such "purposefully directed" marketing activities will result in substantial local sales. Clearly, the contacts of an out-of-state vendor with a jurisdiction in which it regularly solicits, and actually consummates, many millions of dollars in sales are obviously much more than "random, fortuitous or attenuated". Id.

The second fallacy in the Bellas Hess analysis is the proposition that a business must have a tangible presence in a state in order to benefit from such state's governmental services and protection. The more realistic view is that a business engaged in exploiting a local market by any means, whether through the activities of employees or agents, or through the mailing of catalogs, is benefiting from the governmental activities that foster the domestic market. This view is presented in detail in the decision under review. 470

N.W. 2d at 217-19. It also appears to be the unanimous conclusion of all commentators who have considered the issue. Id., at 217. We would point out, in addition, that the three-factor formula for state tax apportionment, repeatedly sanctioned by this Court, incorporates the proposition that the state in which goods are sold, for that reason alone, makes a substantial contribution to the value of a multistate enterprise. See, e.g., Container Corporation of America v. Franchise Tax Board, 463 U.S. 159 (1983).

Bellas Hess also fails to accord proper weight to two substantial and legitimate state interests. The first is, of course, the collection of the states' proper revenues. The North Dakota Supreme Court emphasized the enormous breadth of the modern mail order industry. The consequent avoidance loss of revenue through vendees'

tax evasion is, therefore, very substantial and is particularly grievous to hard-pressed states and localities. In addition, the tax evasion encouraged by Bellas Hess permits out-of-state vendors to compete unfairly against local businesses .

In conclusion, the Due Process and Commerce Clauses should operate, in the area of state taxation, as a shield to protect interstate business from unreasonable or discriminatory taxation. Bellas Hess, to the contrary, countenances the use of those provisions as a sword in the cause of tax evasion and unfair competition, while advancing no legitimate constitutional values. The Court should take this opportunity to correct this situation.

Conclusion

For the foregoing reasons, amicus respectfully requests that the petition for certiorari be granted to reconsider the decision of this Court in Bellas Hess.

Respectfully submitted,

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No. 91-194

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

QUILL CORPORATION,
Petitioner,
v.
STATE OF NORTH DAKOTA, BY AND THROUGH ITS TAX COMMISSIONER, HEIDI HEITKAMP,
Respondent.

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BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL GOVERNORS' ASSOCIATION, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL LEAGUE OF CITIES, AND U.S. CONFERENCE OF MAYORS, JOINED BY THE MULTISTATE TAX COMMISSION, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether North Dakota Cent. Code § 57-40.2-01 (Supp. 1991), which imposes the obligation to collect use tax on any retailer that "engages in regular or systematic solicitation of a consumer market" in North Dakota, violates the Commerce Clause or the Due Process Clause of the United States Constitution.

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BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL GOVERNORS' ASSOCIATION, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL LEAGUE OF CITIES, AND U.S. CONFERENCE OF MAYORS, JOINED BY THE MULTISTATE TAX COMMISSION, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICI CURIAE*

Amici National Conference of State Legislatures, National Governors' Association, Council of State Governments, National Association of Counties, In-

ternational City/County Management Association, National League of Cities, and U.S. Conference of Mayors are organizations whose members include state, county, and municipal governments and officials throughout the United States. They and their members have a compelling interest in legal issues that affect state and local governments, including questions of taxing authority. They have accordingly filed *amicus* briefs in such recent tax cases as *Trinova Corp. v. Michigan Department of Treasury*, 111 S.Ct. 818 (1991), *Goldberg v. Sweet*, 488 U.S. 252 (1989), and *D.H. Holmes Co. v. McNamara*, 486 U.S. 24 (1988).

Amicus Multistate Tax Commission ("MTC") is the official administrative agency of the Multistate Tax Compact. Eighteen States and the District of Columbia have entered into the Compact as full members; 14 States have joined the Compact as associate members. The MTC has a strong interest in tax disputes that affect the administration of state tax systems.[1]

This case involves a constitutional challenge to a North Dakota statute that imposes use tax collection obligations on any retailer that "engages in regular or systematic solicitation of a consumer market in [the] state by the distribution of catalogs, periodicals, advertising flyers, or other advertising, or by means of print, radio or television media, by mail, telegraphy, telephone, computer data base, cable, optic, microwave, or other communication system." N.D. Cent. Code §57-40.2-01(6). At least 18 States besides

[1] This brief should not be read to reflect the views of any MTC member State, including but not limited to North Dakota, that files or joins a separate brief in this case.

North Dakota have enacted identical or substantially similar legislation expressly imposing use tax collection obligations on retailers solely on the basis of their economic presence in the State. In addition, at least 15 States have enacted other forms of use tax legislation that take account of the evolution of the direct marketing industry during the past two decades.

This Court's decision in *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), casts a shadow of uncertainty over current use tax collection efforts. This uncertainty has had debilitating fiscal consequences for many States and local governments at a time when they can ill afford a loss of tax revenue. *Amici* accordingly submit this brief to urge the Court to grant the petition for a writ of certiorari.[2]

SUMMARY OF ARGUMENT

The petition should be granted for three related reasons. First, the question of taxing authority presented is of profound fiscal importance. Second, at least 34 States have enacted use tax collection legislation that responds to the evolution in size and technological sophistication of the direct marketing industry. Third, challenges to these statutes have spawned litigation all over the country, the resolution of which depends on the Court's decision in *Bellas Hess*. This ongoing nationwide litigation has had directly conflicting results: the judgment of the North Dakota Supreme Court conflicts with the judgments of the Connecticut and Pennsylvania Supreme Courts.

[2] The parties' letters of consent have been filed with the Clerk pursuant to Rule 37.2 of the Court.

The North Dakota Supreme Court correctly recognized that because of the massive changes in direct marketing in the past quarter century, economic presence, like physical presence, may provide the basis for the assertion of state taxing authority. The Court's guidance on this pressing issue of national importance is urgently needed.

REASONS FOR GRANTING THE WRIT

I. THE QUESTION PRESENTED IS OF GREAT FISCAL IMPORTANCE

At least $2.2 billion in use tax revenue was lost in 1988 because of the failure to collect use tax on sales by direct marketers. *See* Advisory Commission on Intergovernmental Relations, *Estimates of Revenue Potential from State Taxation of Out-of-State Mail Order Sales* 8 (1987) ("ACIR Study").[3] Since 1988, annual revenue loss has steadily worsened. At least eighteen States have increased their sales and use tax rates in the past three years.[4] At the same time, retail sales via direct marketing have continued to mushroom; direct marketing retail sales to individual consumers increased from $48.3 billion in 1988 to $57.5 billion in 1990—an 18.9% increase in just two years.[5]

Revenue losses will substantially increase in the years ahead as direct marketers continue to exploit the latest technological developments and expand their market share of retail trade. The direct marketing technologies now coming on-line range from the familiar to the futuristic. Cheap, disposable "videologs", video cassettes that can be viewed on television in a consumer's home, cost retailers no more than printed catalogs. *See* Shani and Reyer, *Videologs: Will They Replace Catalogs?*, 3 Direct: The Magazine for Direct Marketing Management 33, 33-34 (August 1990). At the other extreme of technological sophistication is "interactive television," which allows for instantaneous two-way communication via television between a direct marketer and an in-home consumer. *See* Schell, *Welcome to the Era of Interactive TV*, 3 Direct: The Magazine for Direct Marketing Management 63, 63-4 (March 1991); Barney, *New Interactive TV System Receives FCC Approval*, 3 Direct: The Magazine for Direct Marketing Management 50 (March 1991).

As computers with high-resolution video displays become more widespread in American homes during

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[3] The $2.2 billion figure in the ACIR Study almost certainly understates 1988 revenue losses. Among other things, it fails to take account of either the rapid growth in television direct marketing or the increase in state sales and use tax rates in 1988. *See* ACIR Study at 4-5.

[4] *See* M. Fabricius, *et al., State Budget Actions in 1989* 80-81 (National Conference of State Legislatures: 1989); C. Eckl, *et al., State Budget and Tax Actions 1990* 74-76 (National Conference of State Legislatures: 1990); C. Eckl, *et al., State Budget and Tax Actions 1991*, Appendix F at 9-11 (National Conference of State Legislatures: 1991).

[5] *Compare* A. Fishman, *1989 Guide to Mail Order Sales* I-8 (1989) *with* Fishman, *Mail Order Top 250*, Direct Marketing (July 1991) at 42.

These figures reflect only direct marketing sales of goods to individual consumers, not to businesses, and consequently substantially understate total annual direct marketing sales. To give just one illustration, most of Petitioner's annual sales of office supplies of more than $200,000,000 are to businesses, *see* Pet. App. 2-3, 29, and hence are not reflected in the direct marketing retail sales figures given above.

the next decade, the home shopping market will expand even further. This growth potential is illustrated by Prodigy, a nationwide, computer-accessed information network that is a joint venture between IBM and Sears. In just three years Prodigy has already obtained more than 700,000 subscribers. Fishman, *supra*, *Mail Order Top 250* at 40. Prodigy offers enormous direct marketing possibilities; even at this early stage more than 40 catalog merchants are on-line. *Id.*

The steady evolution of such technologies has, in recent years, greatly enhanced the pervasiveness of direct marketing, a trend that will inevitably continue. In response, hard-pressed States are under increasing pressure to modernize their use tax collection legislation to take account of the reality of the retail industry.

II. MANY STATES HAVE ENACTED USE TAX LEGISLATION THAT RESPONDS TO THE RECENT REVOLUTION IN RETAILING

"[T]he impracticability of [use tax] collection from the multitude of individual purchasers is obvious." *National Geographic Society v. Board of Equalization*, 430 U.S. 551, 555 (1977) (citing *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 343 (1954)). The resulting revenue losses have led to a proliferation of state legislation designed to capture this revenue by imposing use tax collection duties on direct marketers. "Since 1987, a movement has quietly developed among the states to challenge industry interpretations of the scope and applicability of *Bellas Hess* through the passage of state legislation." A. Morse & C. Zimmerman, *Efforts to Collect Sales Tax on Interstate Mail-Order Sales: Recent State Legislation* (National Conference of State Legislatures: 1990) at 1. At least 34 States currently have such laws.

Most of this legislation assumes one of two basic forms. Most common are statutes that, like the North Dakota law, require direct marketers to collect and remit use taxes if they regularly or systematically solicit sales in the State. *See* N.D. Cent. Code § 57-40.2-01 (Supp. 1991). At least 18 States in addition to North Dakota have statutes of this kind.[6]

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[6] *See* Ariz. Rev. Stat. Ann. § 42-1401(5)(b) (1991) (solicitation by mail that is "substantial and recurring"); Ark. Stat. Ann. § 26-53-121(b) (Supp. 1989) ("continuous, regular, or systematic solicitation of retail sales"); Conn. Gen. Stat. Ann. §§ 12-407(12)(g) & (15)(e) (West Supp. 1990) ("regular or systematic solicitation of sales"); Fla. Stat. § 212.0596(2)(e) (Supp. 1990) ("purposefully or systematically exploiting the market provided by this state"); Ga. Code Ann. § 48-8-2(3)(H) (Supp. 1991) ("regular or systematic solicitation of a consumer market in this state"); Kan. Stat. Ann. § 79-3702(h)(2) (Supp. 1990) ("regular or systematic solicitation of sales"); La. Rev. Stat. Ann. § 47:301(4)(*l*) (West Supp. 1991) ("regular or systematic solicitation of a consumer market in this state"); Mass. Ann. Laws ch. 64H § 1 (Law. Co-op. 1991) ("regularly or systematically soliciting orders"); Minn. Stat. Ann. § 297A.21, subdiv. 4(a) (West Supp. 1991) ("regular or systematic soliciting of sales"); Mo. Ann. Stat. § 144.605(2)(a) (Vernon Supp. 1991) ("[p]urposefully or systematically exploiting the market provided by this state"); N.C. Gen. Stat. § 105-164.8(b)(5) (1989) (same); Okla. Stat. Ann. tit. 68, § 1354.1-.5 (West Supp. 1990) ("continuous, regular or systematic solicitation"); Pa. Stat. Ann. tit. 72, § 7201(b)(3) (Purdon 1990) ("[r]egularly or substantially soliciting orders"); R.I. Gen. Laws §§ 44-18-15(1)(E) & -23(c) (Supp. 1990) ("regular or systematic solicitation of sales"); Tenn. Code Ann. § 67-6-102(6)(J) (1989) ("regular or systematic solicitation of a consumer market in this state"); Utah Code Ann. §§ 59-12-102(9)(c) & (17)(b) (Michie Supp. 1991) (same);

Another form of legislation is typified by California's statute. Under the California law, a retailer is required to collect and remit use tax if its solicitations by mail are substantial and recurring, and if, in addition, the retailer benefits from such in-state institutions or activities as financial services, telecommunications, marketing activities, or authorized service facilities. *See* Calif. Rev. & Tax Code Ann. § 6203(f) (West Supp. 1991). Several States have enacted identical or similar legislation.[7]

Vt. Stat. Ann. tit. 32, § 9701(9)(F) (Supp. 1990) ("regular, systematic or seasonal solicitation of sales"); Wash. Rev. Code Ann. § 82.12.040 (Supp. 1991) & Wash. Admin. Code 458-20-221(2)(b)(i) (1989) ("[p]urposefully or systematically exploiting the market provided by this state").

Cf. Miss. Code Ann. § 27-67-3(j) (Supp. 1989) ("selling or taking orders . . . by mail"); N.J. Stat. Ann. § 54:32-2(i)(1)(C) (West 1991) ("solicits business . . . by distribution of catalogs"); N.M. Stat. § 7-9-10(A) (1990) ("attempting to exploit New Mexico's markets"); S.C. Code Ann. § 12-36-70(2)(b) (Law. Co-op. Supp. 1990) ("soliciting business . . . by distribution of catalogs").

[7] *See* Idaho Code § 63-3611(g) (1989) ("if the solicitations [by mail] are substantial and recurring and if the retailer benefits from any banking, financing, debt collection, telecommunication, or marketing activities occurring in this state or benefits from the location in this state of authorized installation, servicing, or repair facilities"); Ill. Rev. Stat. ch. 120, para. 439.2(4) (Supp. 1990) (same); Iowa Code Ann. § 422.43(12)(b) (West 1990) ("if the solicitations [by mail or otherwise] are continuous, regular, or systematic and if the retailer benefits" from specified in-state services); Ky. Rev. Stat. § 139.340(2)(c) (Michie/Bobbs-Merrill 1991) ("soliciting orders . . . on a continuous, regular, or systematic basis in which the solicitation of the order, placement of the order by the customer or the payment for the order utilizes the services of any financial institution, telecommunication system, radio or television station, cable television service,

Whatever its precise form, this legislation reflects the efforts of the States to modernize their use tax collection legislation to conform to changes in the

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print media, or other facility or service located in this state"); Neb. Rev. Stat. § 77-2702(21)(e) (1990) ("if the solicitations [by mail] are continuous, regular, seasonal, or systematic and if the retailer benefits" from specified in-state services); Nev. Rev. Stat. Ann. § 372.728(6) (1989) ("if the solicitations [by mail or electronic facsimile] are substantial and recurring and if the retailer benefits" from specified in-state services); Ohio Rev. Code Ann. § 5741.01(H) & (3) (Anderson Supp. 1990) ("Nexus with this state exists" for solicitations by mail "only if the seller also benefits" from specified in-state services); Tex. Tax Code Ann. § 151.107(a)(5) (Vernon Supp. 1991) ("if the solicitations [by mail] are substantial and recurring and if the retailer benefits" from specified in-state services); Va. Code Ann. § 58.1-612(b)(6) (1991) ("if the solicitations [by mail] are continuous, regular, seasonal, or systematic and if the dealer benefits" from specified in-state services); W. Va. Code § 11-15A-6a(a)(3) (Supp. 1991) ("if the solicitations [by mail] are substantial and recurring and if the retailer economically benefits" from specified in-state services).

Several of the foregoing statutes also create use tax collection obligations if the retailer, for example, (1) solicits orders by television shopping systems or pursuant to a contract with an in-state broadcaster, publisher, or cable-television operator; (2) is owned or controlled by the same interests that own or control in-state retailers in the same or similar business; or (3) has a franchisee, required to collect tax, that operates under the retailer's trade name. *See* Calif. Rev. & Tax Code Ann. § 6203(d)-(e) & (g)-(i) (West Supp. 1991). *See also* Idaho Code § 63-3611(e)-(f) & (h)-(j) (1989); Ill. Rev. Stat. ch. 120, para. 439.2(2)-(3) & (5)-(7) (Supp. 1990); Iowa Code Ann. § 422.43(12)(c)-(d) (West 1990); Neb. Rev. Stat. § 77-2702(21)(f)-(g) (1990); Nev. Rev. Stat. Ann. § 372.728(4)-(5) & (7)-(9) (1989); Ohio Rev. Code Ann. § 5741.01(H)(1) & (6) (Anderson Supp. 1990); Tex. Tax Code Ann. § 151.107(a)(7) (Vernon Supp. 1991); Va. Code

size and sophistication of direct marketing. These laws are intended not only to capture the vast use tax revenues that are owed by state residents and would otherwise be lost, but also fairly and equitably to distribute tax burdens among consumers and to level the playing field for retailers. The validity of these laws turns largely on the vitality of *Bellas Hess*, as is demonstrated by this case and other recent litigation.

III. THE ONGOING LITIGATION EXPLOSION HAS LED TO CONFLICTING AND CONFUSING RESULTS

Given the uncertainty in the law, the enforcement of state legislation imposing use tax collection obligations on direct marketers has given rise to legal challenges all over the country, particularly in those States that are most actively enforcing use tax collection laws. In addition to the North Dakota litigation that is the subject of this petition, challenges to laws imposing use tax collection obligations have already been mounted in the following States.

Connecticut. In two recent cases the Connecticut Supreme Court has construed *Bellas Hess* to invalidate the State's attempts to impose use tax collection obligations on direct marketers with substantial sales to Connecticut residents where the retailers are found to lack physical presence.[8] The judgments of the Connecticut Supreme Court are in direct con-

Ann. § 58.1-612(C)(7)-(8) (1991); W. Va. Code § 11-15A-6a(a)(1), (4)-(5) (Supp. 1991).

[8] *SFA Folio Collections, Inc. v. Bannon*, 217 Conn. 220, 585 A.2d 666, *cert. denied*, 111 S.Ct. 2839 (1991); *Cally Curtis Co. v. Groppo*, 214 Conn. 292, 572 A.2d 302, *cert. denied*, 111 S.Ct. 77 (1990).

flict with the judgment of the North Dakota Supreme Court on the issue of the indispensability of physical presence. *Compare SFA Folio Collections, Inc. v. Bannon*, 217 Conn. at 236 & n.12 ("some degree of physical presence . . . is constitutionally required") *with* Pet. App. 25 ("Quill's asserted lack of physical presence is not fatal to the State's attempt to require Quill to collect and remit use tax").

Pennsylvania. In 1986 and again in 1989 the Pennsylvania Commonwealth Court held that the *Bellas Hess* physical presence requirement invalidated Pennsylvania's efforts to impose use tax collection obligations on out-of-state direct marketers; on June 4, 1991, the Pennsylvania Supreme Court affirmed the latter holding.[9] The Pennsylvania Supreme Court's judgment is in direct conflict with the judgment of the North Dakota Supreme Court on the physical presence issue. On September 3, 1991, Pennsylvania filed a petition for certiorari seeking review of the judgment of the Pennsylvania Supreme Court.[10]

Tennessee. The Tennessee use tax statute, which is substantially the same as the North Dakota statute, has recently been challenged by direct marketers in more than twenty state court proceedings. Two of these cases have thus far resulted in adjudications upholding the constitutionality of the statute in the face of the plaintiff's reliance upon *Bellas Hess*.[11]

[9] *L.L. Bean, Inc. v. Pennsylvania Dept. of Rev.*, 516 A.2d 820 (Pa. Commw. Ct. 1986); *Bloomingdale's by Mail, Ltd. v. Pennsylvania Dept. of Rev.*, 567 A.2d 773 (Pa. Commw. Ct. 1989), *aff'd mem.*, 591 A.2d 1047 (Pa.), *petition for cert. filed*, No. 91-—— (U.S. Sept. 3, 1991).

[10] *See* footnote 9, *supra*.

[11] *Bloomingdale's by Mail, Ltd. v. Huddleston*, No. 89-3017-II (Ch. Ct., March 8, 1991), *appeal filed*, No. 01-S01-9016-

California. Two months ago the federal district court entered summary judgment on the basis of *Bellas Hess* in favor of a trade association of direct marketers in a challenge to the California use tax statute brought under 42 U.S.C. 1983.[12] Direct marketers have also prevailed thus far in two pending state court challenges to the California statute.[13]

Texas. A direct marketing firm recently filed suit for declaratory and injunctive relief against Texas's effort to require it to collect the state use tax pursuant to the Texas use tax statute.[14]

Wisconsin. In a ruling now on appeal, the Wisconsin Tax Appeals Commission, citing *Bellas Hess*, held that the State may not impose use tax collection duties on a direct marketer of computer software that retains ownership of the magnetic tapes

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CH-0047 (Tenn., Apr. 19, 1991); *SFA Folio Collections, Inc. v. Huddleston*, No. 89-3015-III (Ch. Ct., Mar. 11, 1991).

The appeal in *Bloomingdale's by Mail* has been fully briefed and is set for argument in the Tennessee Supreme Court on October 3, 1991. The remaining Tennessee cases are being held in abeyance in the chancery court pending a ruling either by this Court or by the Tennessee Supreme Court.

[12] *Direct Marketing Ass'n, Inc. v. Bennett*, No. Civ. S-88-1067 (E.D. Cal., June 28, 1991) [reproduced in Pet. App. at A67-A73].

[13] *Land's End, Inc. v. State Board of Equalization*, No. 620135 (Cal. Super. Ct., Jan. 18, 1991), *appeal filed*, No. D14839 (Cal. Ct. App., July 10, 1991); *Sturbridge Yankee Workshop, Inc. v. State Board of Equalization*, No. 512584 (Cal. Super. Ct., Jan. 29, 1991); *appeal filed*, No. C011169 (Cal. Ct. App., May 28, 1991).

[14] *Renovator's Supply, Inc. v. Sharp*, No. 91-9493 (Tex. Dist. Ct., filed July 5, 1991).

on which it sends computer programs to in-state consumers.[15]

Ohio. A direct marketer has appealed to the Ohio Board of Tax Appeals from the Ohio Tax Commissioner's determination to require it to collect use tax. According to the direct marketer, *Bellas Hess* precludes Ohio from imposing such tax collection duties.[16]

IV. THIS COURT'S GUIDANCE IS URGENTLY NEEDED

The collection of use taxes is a pressing matter of immense practical importance. Its significance has increased steadily because of the exponential growth, both in size and sophistication, of direct marketing during the past 25 years. A leading academic authority on this issue has persuasively argued that the sea changes in the retail industry require a corresponding evolution in legal doctrine beyond that currently embodied in *Bellas Hess*. As this case illustrates,

> [b]enefits from the taxing state that are unrelated to physical contact with the state may be of vastly greater significance than those derived from the presence of a whole swarm of the out-of-state sellers' agents soliciting business. Practically speaking, some physical presence within the state in furtherance of a business purpose

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[15] *B.I. Moyle Assoc., Inc., v. Wisconsin Dept. of Revenue*, No. 87-S-141 (Wisc. Tax App. Comm'n, Dec. 12, 1990), *petition for review filed*, No. 91-CV-0127 (Wisc. Cir. Ct., Jan. 11, 1991). The appeal has been fully briefed and awaits oral argument.

[16] *SFA Folio Collections, Inc. v. Tracy*, No. 91-295 (Ohio Bd. of Tax App., appeal filed Mar. 8, 1991), appeal from *SFA Folio Collections*, No. 910002000 (Ohio Tax Comm'r, Feb. 8, 1991).

is not essential to the existence of a meaningful nexus with the state.

Hartman, *Collection of the Use Tax on Out-of-State Mail-Order Sales*, 39 Vand. L. Rev. 993, 1014 (1986), *quoted in* Pet. App. 32. *See also* P. Hartman, *Federal Limitations on State and Local Taxation* 631 (1981).

Given the transformation of the retail industry in the past quarter century, an authoritative ruling on the vitality of *Bellas Hess* is essential. This is more than simply a matter of tax revenue lost. A principal purpose of the use tax—to "put local retailers subject to the sales tax on a competitive parity with out-of-state retailers exempt from sales tax", *National Geographic*, 430 U.S. at 355—is totally frustrated by Petitioner's reading of *Bellas Hess*. Additional unfairness results because Petitioner and other direct marketers would readily leave the burden of tax collection "to be shouldered entirely by the local competition, which cannot escape the responsibility to collect and remit the state sales tax." Hartman, *supra*, 39 Vand. L. Rev. at 1013. Not least, the failure to collect use tax "subverts the most effective available method for bringing about equality of taxation between residents who buy locally and those who buy from tax-exempt foreign mail order sellers." *Id.* The Court's guidance on the question presented is therefore urgently needed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 91-194

In the Supreme Court of the United States

OCTOBER TERM, 1991

QUILL CORPORATION, PETITIONER

v.

STATE OF NORTH DAKOTA,
by and through its Tax Commissioner,
HEIDI HEITKAMP, RESPONDENT

On Petition for a Writ of Certiorari to the Supreme Court of North Dakota

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BRIEF OF THE NATIONAL ASSOCIATION OF RETAIL DRUGGISTS, INC., NARDA, INC., MICHIGAN RETAILERS ASSOCIATION, INC., NATIONAL HOME FURNISHINGS ASSOCIATION, INC., AND THE PLUNKETT FURNITURE COMPANY, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Commerce or Due Process Clauses of the United States Constitution preclude a State from requiring an out-of-state seller to collect use taxes on property sold to customers in the State, when the seller regularly solicits in-state but has no physical presence in the jurisdiction.

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BRIEF OF THE NATIONAL ASSOCIATION OF RETAIL DRUGGISTS, INC., NARDA, INC., MICHIGAN RETAILERS ASSOCIATION, INC., NATIONAL HOME FURNISHINGS ASSOCIATION, INC., AND THE PLUNKETT FURNITURE COMPANY, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI CURIAE*

Amici are businesses and organizations whose members include retailers throughout the United States. They are:

The National Association of Retail Druggists, Inc. A Delaware corporation founded in 1898, the association is a private, non-profit, voluntary organization composed of

independent retail pharmacists who own approximately 40,000 outlets across the country.

NARDA, Inc. Incorporated in Illinois in 1943, it has approximately 3200 company members who sell and service home appliances and electronic home entertainment products.

The Michigan Retailers Association. Incorporated in Michigan in 1940, its 3000 members operate more than 5000 storefront locations throughout the State. They include a broad range of retail establishments, including clothiers, jewelry stores, shoe stores, toy and gift stores, book stores, tire dealers, and vehicle service shops.

The National Home Furnishings Association, Inc. Incorporated in Illinois, it represents some 3500 company members who operate more than 13,500 home furnishing retail establishments in all 50 States.

The Plunkett Furniture Company. Begun as a business in 1931 and incorporated in 1950, the company maintains eight retail stores in Illinois that sell furniture, draperies, carpeting, and other home furnishings and accessories.

This case presents an issue of enormous importance to *amici*: whether mail order and direct marketing firms are constitutionally immune from state use taxes. Local retailers must collect and remit sales taxes in 45 States and the District of Columbia; such taxes are not imposed on sales made by out-of-state direct marketers. As a consequence, local retailers are placed at an enormous competitive disadvantage by a rule—contended for by petitioners—that also exempts direct marketers from a duty to collect compensating use taxes. *Amici* therefore submit this brief to assist the Court in the resolution of this case.[1]

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[1] The parties' letters of consent pursuant to Rule 37.2 of the Rules of this Court have been filed with the Clerk of the Court.

STATEMENT

1. Like 44 other States and the District of Columbia, North Dakota imposes a tax on receipts from the sale of property within its borders. N.D. Cent. Code § 57-39.2. Like those other States, North Dakota also imposes a so-called compensating use tax on the in-state use of property that was purchased outside the State's taxing jurisdiction. N.D. Cent. Code § 57-40.2. Such use taxes, which are equivalent in amount to the sales tax imposed on in-state purchases of similar property, are designed both to prevent evasion of the sales tax by persons who make purchases out-of-state and to "put local retailers subject to the sales tax on a competitive parity with out-of-state retailers exempt from the sales tax." *National Geographic Society* v. *California Board of Equalization*, 430 U.S. 551, 555 (1977).[2]

In theory, the use tax falls upon the consumer who uses the property. As the Court has noted, however, "the impracticability of [the use tax's] collection from the multitude of individual purchasers is obvious." *National Geographic*, 430 U.S. at 555. As a consequence, North Dakota imposes the burden of collecting the tax on all reailers "maintaining a place of business in this state" (N.D. Cent. Code § 57-40.2-07); that term is defined to include not only businesses physically present in the State, but also

> every person who engages in regular or systematic solicitation of sales of tangible personal property in

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[2] As a matter of practice, States do not attempt to impose their sales taxes on sales made in the State by direct marketers to out-of-state customers. See McCray, *Commerce Clause Sanctions Against Taxation on Mail Order Sales: A Re-Evaulation*, 17 Urb. Law. 529, 532 (1985). It is an open question whether this practice is constitutionally compelled. See *Evco* v. *Jones*, 409 U.S. 91, 93 (1972); McCray, *supra*, 17 Urb. Law. at 554-555, 565-567. Virtually all States, including North Dakota, provide credits when sales and use taxes are imposed on the same transaction by different States. See *id.* at 532.

> this state by the distribution of catalogs, periodicals, advertising flyers, or other advertising, by means of print, radio or television media, or by mail, telegraphy, telephone, computer data base, cable, optic, microwave, or other communication system for the purpose of effecting retail sales of tangible personal property.

N.D. Cent. Code § 57-40.2-01(7). The term "regular or systematic solicitation" is administratively defined to mean "three or more separate transmittances of any advertisement or advertisements" during a specified 12-month period. N.D. Admin. Code § 81-04.1-01-03.1(3).

2. Petitioner Quill Corporation is a Delaware corporation with offices and warehouses in Illinois, California, and Georgia. Pet. App. A2. It operates a national direct marketing business selling office supplies and equipment. *Ibid.* Petitioner does not maintain an office in North Dakota, does not send sales or other personnel into the State, and does not advertise through local newspapers or broadcast outlets. *Id.* at A39. Quill does, however, extensively solicit business in North Dakota through the use of catalogs and flyers; each year, it mails more than 60 such publications—involving more than 230,000 separate pieces of mail that, in the aggregate, weigh over 24 tons—to customers in the State. *Id.* at A3. Similarly, Quill licenses a computer software program to its North Dakota customers that permit them direct access to Quill's computer, where they may check inventory, confirm prices, and order merchandise. *Id.* at A29. In addition, Quill solicits customers by telephone and maintains a "help line" for customers to call with questions about its products. *Ibid.* As a consequence of this activity, Quill has several thousand customers and annual sales of just under $1 million in North Dakota, making it the sixth largest seller of office supplies in the State. *Id.* at A2-A3.

Although it is undisputed that petitioner meets the statutory definition of a "retailer maintaining a place of

business" in the State (see Pet. App. A5), Quill refused to collect the tax on goods purchased for use in North Dakota. See *id.* at A4. It based its position on this Court's decision in *National Bellas Hess, Inc.* v. *Department of Revenue*, 386 U.S. 753 (1967), which held unconstitutional under the Due Process and Commerce Clauses of the United States Constitution the imposition of use tax liability on a mail order firm that did not have a physical presence in the taxing State. North Dakota responded by bringing this declaratory judgment action to settle Quill's liability. See Pet. App. A4. The trial court found the State's arguments in favor of the constitutionality of its use tax "quite persuasive" (*id.* at A40), but felt constrained by the decision in *Bellas Hess* to hold the tax unconstitutional as applied to Quill. *Id.* at A42.

The North Dakota Supreme Court reversed. Pet. App. A1-A36. The court premised its holding on the conclusion that *Bellas Hess* is "an obsolescent precedent" (*id.* at A10) and that this Court "would so conclude." *Id.* at A13. The state court began by observing that "[t]he economic, social, and commercial landscape upon which *Bellas Hess* was premised no longer exists," noting that "'mail order' has grown from a relatively inconsequential market niche into a goliath now more accurately delineated as 'direct marketing.'" *Id.* at A11. The court explained that the volume of mail order sales has grown exponentially (*id.* at A12) and that, as a consequence of changing technology, "[t]oday a direct marketer can communicate with his customers across the country through toll-free incoming telephone lines, national WATS telephone service, fax machines, telex, or direct computer communication just as effectively, and more efficiently, than if he were calling personally on each customer." *Id.* at A13. The court also found that technological advances in computer and automated accounting systems "have greatly alleviated the administrative burdens created by [a use tax] collection duty." *Id.* at A26.

The court next observed that "the legal landscape [has] been altered in th[e] quarter-century" since *Bellas Hess* was decided. Pet. App. A13 (footnote omitted). The court below explained that, in the intervening period, this Court abandoned the "formalism" that previously had characterized decisions under the Commerce Clause. *Id.* at A14; see *id.* at A15-A19. The state court also noted that this Court has "significantly broadened the closely related Due Process analysis in personal jurisdiction cases" (*id.* at A19), recognizing that "technological advances have made physical presence within the jurisdiction meaningless in modern commerce." *Id.* at A20. With this in mind, the court below held that "Quill's asserted lack of physical presence is not fatal to the State's attempt to require Quill to collect and remit use tax on its sales into North Dakota." *Id.* at A25. Instead, the court concluded that "the concept of nexus encompasses more than mere physical presence within the state, and that the determination of nexus should take into consideration all connections between the out-of-state seller and the state, all benefits and opportunities provided by the state, and should stress economic realities rather than artificial benchmarks." *Id.* at A25-A26.

Applying this standard here, the court found that Quill's links to North Dakota—its continuous solicitation of the North Dakota market, lease of computer software to in-state customers, disposal of catalogs in the State, and contacts with North Dakota financial institutions to check credit information—established sufficient nexus to support use tax liability. Pet. App. A28-A35. The court also concluded "that the State provides benefits, services, and opportunities which significantly aid Quill's business and which are related to the use tax." *Id.* at A36. It accordingly rejected petitioner's claims under the Commerce and Due Process Clauses and held that Quill must collect and remit the use tax. *Id.* at A36.

REASONS FOR GRANTING THE PETITION

In the years since *Bellas Hess* was decided, the mail order industry has grown enormously. Indeed, as the court below observed, the term "mail order" has become something of a misnomer; marketers such as Quill use a wide range of technologically advanced solicitation and ordering practices in addition to those historically associated with mail order houses. See Pet. App. A11-A13. As a consequence, more than $180 billion worth of products were sold by direct marketers in 1989 (see *id.* at A12); between 15% and 25% of all retail sales are now made by mail. See *id.* at A63; *Douglas, State Officials Determined to Tax Interstate Mail-Order Sales*, 47 Tax Notes 1048 (1990); Hartman, *Collection of the Use Tax on Out-of-State Mail-Order Sales*, 39 Vand. L. Rev. 993, 1008 (1986). Yet under the physical presence rule of *Bellas Hess*, a substantial portion of these transactions are constitutionally immune from state taxation.

Against this background, whether *Bellas Hess* retains its vitality is a matter of exceptional importance both to the administration of state tax laws and to the operation of local economies. Sales and use taxes account for almost 25% of the revenues of state and local governments, with 14 States relying on such levies for more than 40% of their revenues. See Advisory Comm'n on Intergovernmental Relations, *State and Local Taxation of Out-of-State Mail Order Sales* 6 (1986) (hereinafter cited as "ACIR Report"); Pet. App. A64. The rule of *Bellas Hess* thus digs deeply into the tax bases of state and local governments: the best estimates suggest that the immunity of mail order sales from taxation costs the States between $2 to $3 billion a year in tax revenue. See Morse & Zimmerman, *Efforts to Collect Sales Tax on Interstate Mail-Order Sales: Recent State Legislation* 1 (1990) (prepared for presentation to the National Conference of State Legislatures); Douglas, *supra*, 47 Tax

Notes at 1048-1049; Note, *Collecting the Use Tax on Mail-Order Sales*, 79 Geo. L.J. 535, 538 (1991).

At the same time, of course, the immunity of mail order firms from sales and use taxes gives them a significant competitive advantage over local retailers, who are obligated either to pass the taxes on to their customers or to absorb the levies themselves. This competitive effect is substantial; with state sales taxes now levied at rates ranging from 2% to 7.5%—and with local governments imposing additional sales taxes at rates ranging up to 4.25% (see ACIR Report 23)—the most widely accepted analyses indicate that every 1% increase in a jurisdiction's sales tax may reduce local retail sales by some 6%. Pet. App. A65. See ACIR Report 38-40; Mowen, Wiener & Young, *Consumer Store Choice and Sales Taxes: Retailing, Public Policy, and Theoretical Implications*, 66 J. Retailing 222, 234-235, 238 (1990). This distortion in the market, it seems plain, has no rational economic justification. See ACIR Report 5; Hellerstein, *Significant Sales and Use Tax Developments During the Past Half Century*, 39 Vand. L. Rev. 961, 982 (1986).

In our view, the conclusion of the court below—that a rule having such untoward consequences is not constitutionally compelled—was entirely correct. We recognize, however, that state courts, legislatures, and taxing authorities have taken widely varying approaches to the issue. And ultimately, of course, it is this Court's prerogative to determine whether its decisions remain good law. We accordingly urge the Court to grant review so that it may definitively settle the question presented here: whether physical presence in the jurisdiction is a necessary prerequisite to the assertion of a State's taxing authority.

1. At the outset, the analysis used by the Court below cannot be reconciled with this Court's holding in *Bellas*

Hess. Petitioner overstates matters by arguing (at Pet. 9) that this case is factually indistinguishable from *Bellas Hess*; advances in technology allow Quill to take advantage of computer contacts, telefax links, and customer service telephone banks that were unknown in 1967. See Pet. App. A13, A29-A30, A35; Pet. 3. But for the most part, the additional contacts here are no different in substance from the links that were held constitutionally inadequate in *Bellas Hess*. In each case, the mail order firm carried on substantial economic activities in the taxing jurisdiction; in each, the firm had an insubstantial physical presence there.

Indeed, while Quill maintains an in-state property interest in computer software that it leases to North Dakota customers (see Pet. App. A29-A31, A35), the court below did not attempt to distinguish *Bellas Hess* on that ground. Instead, it candidly explained that *Bellas Hess* is "an obsolescent precedent" (*id.* at A10), concluding "that the foundational basis of *Bellas Hess* has been eroded and that the Supreme Court would so conclude." *Id.* at A13. The court accordingly held that "the concept of nexus encompasses more than mere physical presence within the state" (*id.* at A25), explaining that, "[w]hether or not an out-of-state seller has a physical presence within the State, it is the in-state infrastructure which creates and maintains the consumer market and economic climate that fosters demand for the seller's goods and services." *Id.* at A32. That conclusion cannot be squared with the distinction drawn in *Bellas Hess* "between mail order sellers with retail outlets, solicitors, or property within a State, and those who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business." 386 U.S. at 758. And while that distinction is, in our view, insubstantial, petitioner is correct in suggesting (Pet. 18-19) that this Court ultimately must determine which of its holdings no longer remain good law. Review of the decision below is warranted for that reason alone.

Similarly, the decision below cannot be reconciled with the holdings of other state courts of last resort. Most notably, the Connecticut Supreme Court recently concluded that *Bellas Hess* remains controlling precedent, holding flatly "that some degree of physical presence, whether by the presence of a retail store, offices, local agents, solicitors, or local advertising, is constitutionally required to support" imposition of a duty to collect use tax. *SFA Folio Collections, Inc.* v. *Bannon*, 585 A.2d 666, 674-675 n.12 (Conn. 1991), cert. denied, 111 S. Ct. 2839 (1991). See *id.* at 670, 674-676 (rejecting claim that the *Bellas Hess* standard no longer is controlling). That court accordingly held the levy of such a tax unconstitutional on facts strikingly similar to those at issue here. See *id.* at 669, 671. Indeed, the court below noted and expressly rejected the holding in *SFA Folio*, explaining that it did "not find the reasoning of that case persuasive." Pet. App. A34. Again, this Court should grant review to resolve the conflict.

2. Having said that, it bears emphasis that the decision below is not an idiosyncratic departure from this Court's precedent. Other state courts also have expressed doubts about the vitality of this Court's decisions on the taxation of out-of-state businesses. Several have suggested, for example that this Court "has apparently repudiated" the reasoning of *Miller Brothers Co.* v. *Maryland*, 347 U.S. 340 (1954), a decision upon which *Bellas Hess* substantially relied. *Rowe-Genereux, Inc.* v. *Vermont Department of Taxes*, 411 A.2d 1345, 1350 (Vt. 1980). See *Good's Furniture House, Inc.* v. *Iowa State Board of Tax Review*, 382 N.W.2d 145, 149 (Iowa) (*Miller Brothers* "eroded"), cert. denied, 479 U.S. 817 (1986); *In the Matter of Webber Furniture*, 290 S.W.2d 865, 869 (S.D. 1980) (same).

And perhaps because the law in this area is unsettled, the state courts have reached conflicting conclusions about the relevance under *Bellas Hess* of particular contacts

with the taxing State. Thus the Alabama Supreme Court held that the lease of films by mail permits the imposition of a tax on the out-of-state lessor (*Boswell* v. *Paramount Television Sales, Inc.*, 282 So. 2d 892, 893, 896-897 (Ala. 1973)); on virtually identical facts, the Connecticut Supreme Court found insufficient nexus to tax. *Cally Curtis Co.* v. *Groppo*, 572 A.2d 302, 303, 306 (Conn.), cert. denied, 111 S. Ct. 77 (1990). One court has held that in-state visits by customer service representatives do not confer jurisdiction to tax (*L.L. Bean, Inc.* v. *Department of Revenue*, 516 A.2d 820, 823, 825-826 (Pa. Commw. Ct. 1986); cf. *Alan Wood Steel Co.* v. *School District of Philadelphia*, 229 A.2d 881, 883, 887 (Pa. 1967) (citing *Bellas Hess*, visits by "promotion men" held insufficient to establish nexus under state law)); other courts have held that similar visits support state taxing authority. *Proficient Food Co.* v. *New Mexico Taxation and Revenue Department*, 758 P.2d 806, 807, 808-809 (N.M. Ct. App. 1988) (visits by customer representatives, telephone solicitation, and in-state deliveries establish nexus). The Ohio Supreme Court held local advertising insufficient to authorize taxation (*Book-of-the-Month Club, Inc.* v. *Porterfield*, 268 N.E.2d 272, 274 (Ohio 1971)); other courts regard in-state advertising as a significant link. See, *e.g.*, *Good's Furniture*, 382 N.W.2d at 146-147, 150 (advertising and delivery by taxpayer's trucks establish nexus).

In all, the varying approaches taken by the state courts have subjected otherwise similarly situated taxpayers to differing constitutional rules in different States. That disuniformity warrants this Court's attention.

3. In addition, whether *Bellas Hess* remains good law will determine the constitutionality of a very substantial body of state legislation. As doubts about the vitality of the physical presence rule have grown, States have become increasingly assertive in their attempts to exercise taxing authority against mail order firms. At least 21 States have enacted laws that, like North Dakota's, expressly

impose tax liability on direct marketers that regularly solicit business in-state.[3] The tax laws of at least 10 other States similarly reach firms that solicit by mail or telephone, so long as those firms also benefit from banking, debt collection, or related activity in the jurisdiction.[4] The enforceability—and constitutionality—of these laws turns on the status of the *Bellas Hess* rule.

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[3] See Ariz. Rev. Stat. Ann. § 42-1401(5)(b) (1990); Ark. Stat. Ann. § 26-53-121(b) (1990); Conn. Gen. Stat. § 12-401(12)(g) & (15)(e) (1990); Fla. Stat. § 212.0596(2)(e) (1990); Ga. Code Ann. § 48-8-2(3)(H) (1990); 1990 Kan. Sess. Laws 357(h) (repealing Kan. Stat. Ann. § 79-3702); 1990 La. Acts 478, *to be codified at* La. Rev. Stat. Ann. § 47:301(4)(k); Mass. Ann. Laws ch. 64H, § 1(1) (1991); Minn. Stat. § 297A.21(8)(c) (1990); Miss. Code Ann. § 27-67-3(j) (1990); N.J. Stat. Ann. § 54:32B-2(I)(C) (West 1990); N.C. Gen. Stat. § 105-164.8(b)(5) (Supp. 1990); N.D. Cent. Code § 57-40.2-01(6) (Supp. 1991); Okla. Stat. tit. 68, § 1354.1 (1990); Pa. Cons. Stat. Ann. § 7201(b)(3) (Purdon 1989); R.I. Gen. Laws § 44-18-15(1)(E) (1990); S.C. Code Ann. § 12-36-70(2)(b) (Law. Co-op. 1991); Tenn. Code Ann. § 67-6-102(6)(J) (1990); Utah Code Ann. § 59-12-102(9)(c) & (17)(b) (1991); Vt. Stat. Ann. tit. 32, § 9701(9)(F)(iii) (1990). While New Mexico's statute does not expressly hinge liability to collect the use tax on enumerated direct marketing activities, it imposes liability on retailers "attempting to exploit New Mexico's markets." N.M. Stat. Ann. § 7-9-10(A) (1990).

[4] Cal. Rev. & Tax. Code § 6203(f) (Deering 1991); Idaho Code § 63-3611(g) (1990); Ill. Rev. Stat. ch. 120, para. 439.2(4) (1989); Iowa Code § 422.43(b) (1989); Ky. Rev. Stat. Ann. § 139.340(c) (Baldwin 1991); Neb. Stat. § 77-2702(21)(e) (1989); Nev. Rev. Stat. Ann. § 372.728(6) (Michie 1989); Ohio Rev. Code Ann. § 5741.01(H)(3) (Baldwin 1991); Tex. Tax Code Ann. § 151.107 (a)(5) (Vernon Supp. 1991); W. Va. Code § 11-15A-6a (1991). Four additional States authorize the imposition of use tax liability on direct marketers to the extent permitted by the United States Constitution, or if permitted by Congress or this Court. See Colo. Rev. Stat. § 39-26-306 (1990) (if authorized by federal legislation); N.Y. Tax Law § 1101(b)(8)(C)(II) (Consol. 1991) (to extent permitted by Constitution); Va. Code Ann. § 58.1-612(D) (1991) (to extent allowed by federal law or this Court); Wash. Rev. Code § 82.12.040(1) (1990) (to extent permitted by Constitution).

In the meanwhile, uncertainty about *Bellas Hess* has led state officials to take wildly inconsistent approaches in their assertion of this new state taxing authority. While some state revenue officers have not attempted to enforce their laws against mail order firms, at least 17 States are (with varying degrees of vigor) endeavoring to collect use taxes from direct marketers. See Morse & Zimmerman, *supra*, at 3-4, 10; Douglas, *supra*, 47 Tax Notes at 1048. Conversely, a number of mail order firms, uncertain about the status of the law and unwilling either to engage in the expense of litigation or to run the risk of accumulating large back tax liabilities, are complying with the laws voluntarily. See Morse & Zimmerman, *supra*, at 3-12.

As a result, either some States are foregoing legitimate opportunities to tax or some taxpayers are paying unconstitutional levies. In either case, it would be appropriate for this Court to settle the confusion that has led to unfair (and possibly unconstitutional) disuniformities across the nation. And, in our view, the Court should intervene sooner rather than later; because some States are now asserting their taxing authority, the general obligation to refund unconstitutionally collected taxes (see *McKesson Corp.* v. *Division of Alcoholic Beverages & Tobacco*, 110 S. Ct. 2238 (1990)) means that any future reaffirmation of *Bellas Hess* may have a dramatically disruptive effect on state treasuries.

4. Finally, it should be added that, as the court below persuasively demonstrated, *Bellas Hess* cannot be reconciled with this Court's more recent holdings. The *Bellas Hess* Court derived its rule from earlier decisions under the Due Process and Commerce Clauses. The rule was controversial from its inception: Justice Fortas, writing for three Members of the Court, had "no doubt" at the time that "large-scale, systematic, continuous solicitation and exploitation of the [in-state] consumer market is a sufficient 'nexus'" to support tax liability. 386 U.S. at

761 (Fortas, J., dissenting). And in the intervening years, both props underlying the *Bellas Hess* decision have been substantially undercut.

So far as due process is concerned, the Court has made clear in the related context of personal jurisdiction that a State's authority

> may not be avoided merely because the defendant did not *physically* enter the forum State. * * * [I]t is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted. So long as a commercial actor's efforts are "purposefully directed" toward residents of another State, [the Court] ha[s] consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there.

Burger King Corp. v. *Rudzewicz*, 471 U.S. 462, 476 (1985) (emphasis in original). See *Asahi Metal Industry Co.* v. *Superior Court*, 480 U.S. 102, 109-110 (1987) (plurality opinion); *id.* at 117-120 (Brennan, J., concurring in part and concurring in the judgment); *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 297-298 (1980).

Under these precedents, North Dakota courts plainly could assert jurisdiction over Quill if, for example, an in-state purchaser brought suit because he was injured by one of the products that Quill shipped into the State. See *Burger King*, 471 U.S. at 473; Pet. App. A24. There is no reason to suppose that the State nevertheless lacks authority to impose a duty to collect a tax on Quill arising out of the same transaction. To the contrary, the Court held in the leading case of *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945)—which was both a personal jurisdiction and a jurisdiction to tax case (see *Shaffer* v. *Heitner*, 433 U.S. 186, 203 (1977))—that due

process objections to personal jurisdiction and to state taxing authority must be judged by the same standard: "The activities which establish [the taxpayer's] 'presence' subject it alike to taxation by the state and to suit to recover the tax." 326 U.S. at 321. And that is hardly surprising, since the same "minimum contacts" formula is the touchstone in each setting. Compare, *e.g.*, *Burger King*, 471 U.S. at 474; *World-Wide Volkswagen*, 444 U.S. at 291; *International Shoe*, 326 U.S. at 316, with *National Geographic Society* v. *California Board of Equalization*, 430 U.S. 551, 561 (1977); *Miller Brothers*, 347 U.S. at 345.

As for the Commerce Clause, *Bellas Hess* based its restrictive nexus holding principally on *Freeman* v. *Hewit*, 329 U.S. 249 (1946), which invalidated a levy imposed on receipts from interstate sales "because it taxe[d] the very process of interstate commerce." *Id.* at 253; see *id.* at 255-256. See *Bellas Hess*, 386 U.S. at 756; *id.* at 759 ("it is difficult to conceive of commercial transactions more exclusively interstate in character than the mail order transactions here involved"). As the Court subsequently has explained, however, decisions such as *Freeman* and *Spector Motor Service* v. *O'Connor*, 340 U.S. 602 (1951), "reflect[] an underlying philosophy that interstate commerce should enjoy a sort of 'free trade' immunity from state taxation." *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 278 (1977) (footnote omitted). This approach, the Court continued, was "viewed in the community as a triumph of formalism over substance." *Id.* at 281. In *Complete Auto*, which reformulated and rationalized Commerce Clause jurisprudence, the Court accordingly overruled *Spector* and disapproved the *Freeman* rule. *Id.* at 288-289. And with the support of *Freeman* removed, *Bellas Hess* must be viewed as an exceedingly shaky precedent.

In these circumstances, a decision that has been stripped of its doctrinal underpinnings remains on the books as

an impediment to legitimate state taxing authority and an obstacle to properly functioning local markets. And the tension in this Court's decisions inevitably will exacerbate the conflict among state courts and the disuniformities in the approaches taken by state taxing authorities. Further review therefore is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 91-194

In The
Supreme Court Of The United States
October Term, 1991

QUILL CORPORATION
Petitioner

v.

STATE OF NORTH DAKOTA,
by and through its Tax Commissioner,
HEIDI HEITKAMP, *Respondent*

On Petition for Writ of Certiorari to the Supreme Court of the State of North Dakota

BRIEF OF THE STATE OF CONNECTICUT, AND THE STATES OF ARIZONA, ARKANSAS, CALIFORNIA, FLORIDA, IDAHO, ILLINOIS, IOWA, MICHIGAN, MINNESOTA, NEVADA, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, OHIO, OKLAHOMA, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, VERMONT, VIRGINIA, WYOMING AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI CURIAE

The Signatory states submit this brief as *amici curiae* in support of Quill Corporation's petition for certiorari to review a decision of the North Dakota Supreme Court, *North Dakota v. Quill Corporation*, 490 N.W.2d 203 (1991). The *amici* support the petition for certiorari because they believe that the issue raised in *North Dakota v. Quill* is of vital importance to the states and warrants plenary review by this Court. Should certiorari be granted, the amici states expect to file a brief *amici curiae* supporting the decision of the North Dakota Supreme Court. Since this brief is being filed on behalf of the States of Connecticut and Arizona, Arkansas, California, Florida, Idaho, Illinois, Iowa, Michigan, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Vermont, Virginia, Wyoming, by their Attorneys General, consent to its filing is not required. United States Supreme Court Rule 37.5.

The issue presented by this case is whether a state can require out-of-state mail order companies to collect the state's use tax without violating the Constitution. In *National Bellas Hess, Inc. v. Dept. of Revenue*, 386 U.S. 753 (1967), this Court held that mail order companies which do not maintain a physical presence within a state cannot, consistent with the Due Process and Commerce Clauses of the Constitution, be compelled to collect a use tax from that state's residents for purchases made for use within the state. In view of both the enormous changes in the scope and technology of the mail order industry since 1967 and the evolution of the doctrine of nexus in decisions of this Court over the past twenty years, the *amici* states believe that this Court's decision in *Bellas Hess* should be reexamined.

This issue is of importance to all 46 states[1] which have sales and use taxes. The issue is of vital importance to those 30 states, including North Dakota, which have amended their

[1] *See* 1A CCH All States Sales Tax Reporter, Para. 8-410 (1991).

tax statutes to specifically impose tax collection obligations upon out-of-state mail order sellers.[2]

It is estimated that, in 1985, the failure of mail order companies to collect such state use taxes resulted in a revenue loss of over $1 *billion* to the District of Columbia and the 46 states that have a sales and use tax. (Source: *Intergovernmental Perspective*, "A Special Report," Advisory Commission on Intergovernmental Relations (ACIR), Fall 1985, p.29, 30-31). For the year 1988, the estimated revenue loss to all states had grown to over $2 *billion*. (ACIR, *State and Local Taxation of Out-of-State Mail Order Sales*, Sept., 1987.)

Because of the erosion of the factual and legal underpinnings of *Bellas Hess* in the nearly quarter century since that decision, and because of the enormous impact that ruling has on state tax revenues, the continued application of *Bellas Hess* to interstate mail order companies is of grave interest to the *amici* states.

In fact, a maelstrom is currently brewing in state courts throughout the country, where the issue has been raised with conflicting results. In Pennsylvania and Connecticut, the State Supreme Courts have applied *Bellas Hess* to bar the imposition of a use tax collection responsibility on out-of-state mail order companies with no physical presence within the state. *See SFA Folio Collections, Inc. v. Bannon*, 217 Conn. 220, 585 A.2d 666, *cert. denied*, 59 U.S.L.W. 3838 (U.S. 1991) and *Bloomingdale's By Mail, Ltd. v. Commonwealth of Pennsylvania*, 567 A.2d 773 (Pa. Cmwlth. 1989), *aff'd per curiam*, 591 A.2d 1047 (Pa. 1991)[3]. Justices White and Blackmun dissented from the denial of certiorari in the Connecticut *SFA Folio* case. By contrast, two Tennessee courts have distinguished *Bellas Hess* based on the enormous changes since it was decided and upheld a Tennessee law similar to North Dakota's. *Bloomingdale's By Mail, Ltd. v. Huddleston*, Chancery Court, Davidson County, Tenn. (Mar. 11, 1991) and *SFA Folio Collections, Inc. v. Huddleston*, Chancery Court, Davidson County, Tenn. (Mar. 11, 1991). These cases are now on appeal.

This Court should reconsider the viability of *Bellas Hess* in view of the dramatic legal and social changes that have occurred in the twenty-four years since it was decided. As long

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[2] Alabama, Ala. Code § 40-23-1(5) as amended by Act 536, Laws 1986.
Arizona, Ariz. Rev. Stat. § 42-1401.5(b) amended by Sen. Bill 1141, ch. 312, Laws 1989.
Arkansas, Ark. Code § 26-53-102(4) (Michie Supp. 1987).
California, Cal. Rev. and Tax Code § 6203(d), (e), (f), (g), (h), (i).
Colorado, Colo. Rev. Stat. § 39-26-301 amended by H.B. 90-1003, Laws 1990.
Connecticut, Conn. Gen. Stat. § 12-407(12), (15) as amended by Act 41, Laws 1989.
Florida, Fla. Stat. § 212 as amended by S. 1244, Laws 1987.
Georgia, O.C.G.A. § 48-8-2(3)(H) as amended by Act 1289, H.B. 442, Laws 1990.
Idaho, Idaho Code § 63-3611 as amended by ch. 311, § 2.
Illinois, ch. 120, par. 439 as amended by P.L. 86-261.
Iowa, Iowa Code § 422.43 as amended by H.F. 2459, Laws 1988.
Kansas, Kan. Stat. Ann. § 79-3702(h) as amended by S.B. 488, Laws 1990.
Kentucky, Ky. Rev. Stat. § 139.340(2) as amended H. 870, Laws 1988.
Louisiana, La. Rev. Stat. Ann. § 47:3401(4)(1).
Massachusetts, Mass. Gen. Laws ch. 64H, § 1(5) as amended by ch. 202 (H.B. 6002), Laws 1988.
Minnesota, Minn. Stat. § 297A.21 (1990) as amended by 1991 Minn. Laws Ch. 291, art. 8, 13 and 14.
Mississippi, Miss. Code § 27-67-3 as amended by ch. 509 (S.B. 3035), Laws 1988
Missouri, Mo. Rev. Stat. § 144.605 as amended by H.B. 960, Laws 1990.
Nebraska, Neb. Rev. Stat. § 77-2702(21) as amended by L.B. 304, Laws 1987.
Nevada, ch. 372, Nev. Rev. Stat. as amended by S.B. 444, 1989.
New Jersey, N.J.S.A. 54:32B-2(i)(C).
New Mexico, N.M. Stat. Ann. § 7-9-10 as amended by S.B. 52, Laws 1990.
North Dakota, § 57-40.2-01(6) as amended by H.B. 1195, Laws 1987.
Ohio, Ohio Rev. Code 5741.01(H) amended by S.B. No. 303, Laws 1990.
Oklahoma, Okla. Stat. Ann. tit. 68 §§ 1354.1-1354.6 amended by H. 2026, Laws 1988.
Rhode Island, R.I. Gen. Laws § 44-18-23.
South Carolina, S.C. Code 1976 § 12-35.95 as amended by H.B. 2590, Laws 1987.
Tennessee, Tenn. Code Ann. 67(6)-102(4)(J).
Utah, Utah Code Ann. § 59-12-102(9)(c); § 59-12-102(17)(b) as amended by S.B. 204, Laws 1990.
Vermont, Vt. Stat. Ann. tit. 32, ch. 233, § 9701(9) as amended by H.B. 891, Laws 1990.

[3] The Commonwealth of Pennsylvania is planning to file a petition for certiorari in *Bloomingdale's By Mail* on September 3, 1991.

as the issue remains unresolved, both the states and mail order companies will face uncertainty and inconsistency in the application of state use taxes. The *amici* thus urge this Court to grant the petition for certiorari.

SUMMARY OF ARGUMENT

1. The ultimate issue presented by this case is whether, in view of both the enormous changes in communications technology and the mail order industry since 1967 and the evolution of the doctrine of nexus in decisions of this Court over the past twenty years, this Court should grant certiorari in order to reexamine its holding in *National Bellas Hess, Inc. v. Dept. of Revenue*, 386 U.S. 753 (1967). The North Dakota Supreme Court, in a thoughtful analysis, concluded that this Court would have reached a different result than it did in *Bellas Hess* if faced with the question today. In fact, this Court has not reconsidered this precise issue in the twenty-four years since *Bellas Hess* was decided, and plenary review is now warranted.

Because of the uncertainty that exists in this area of the law, and because of the enormous tax revenues at stake, a number of state courts throughout the nation have been confronted with the issue of the continuing viability of *Bellas* Hess and have arrived at conflicting conclusions. The Connecticut and Pennsylvania Supreme Courts, in contrast to North Dakota, applied *Bellas Hess* to bar state taxing authorities from requiring the collection of use tax by mail order companies with no physical presence in the state. *SFA Folio Collections, Inc. v. Bannon*, 217 Conn. 220, 585 A.2d 666, *cert. denied*, 59 U.S.L.W. 3838 (U.S. 1991) (White and Blackmun, J.J., dissenting); *Bloomingdale's By Mail, Ltd. v. Commonwealth of Pennsylvania*, 567 A.2d 773 (Pa. Cmwlth. 1989), *aff'd per curiam*, 591 A.2d 1047 (Pa. 1991). The Tennessee Supreme Court will soon be faced with the same issue after two Chancery Court judges distinguished *Bellas Hess* based on the enormous changes since it was decided and upheld a Tennessee use tax law similar

to North Dakota's. *Bloomingdale's By Mail, Ltd. v. Huddleston*, Chancery Court, Davidson County, Tenn. (Mar. 11, 1991), and *SFA Folio Collections, Inc. v. Huddleston*, Chancery Court, Davidson County, Tenn. (Mar 11, 1991). As long as the issue remains unresolved by this Court, both the states and mail order companies alike will face uncertainty and inconsistency in the application of state use taxes.

2. In finding the use tax collection statute at issue in *Bellas Hess* unconstitutional, this Court focused primarily on two points: the lack of physical presence by the mail order company within the taxing state, and the burden on interstate commerce caused by what the Court viewed as a "virtual welter of complicated obligations" in administering the tax collections. *Id.* at 759-60. Both of these factual underpinnings have been undermined by the enormous economic, technological, and social changes during the past two decades.

Dramatic advances in telecommunications and computer technology have created the functional equivalent of physical presence and have permitted a vastly expanded economic presence almost a hundred times greater in dollar volume than in 1967. In the 24 years since *Bellas Hess*, mail order sales have increased from an estimated $2.4 billion to an estimated $150 billion annually, with the estimated rate of growth at 8%-12% per year, and an estimated loss of tax revenue to the states at approximately $2 billion per year. These same advances in computer technology have significantly reduced the burden on the mail order companies of tax collection so that it is no more difficult than many other routine burdens associated with doing business on a multistate basis.

This case presents an opportunity for this Court to reconsider this issue in light of recent developments and to apply a nexus test which more accurately reflects the economic and technological facts of life in the present day mail order enterprise.

ARGUMENT

I. PLENARY REVIEW IS WARRANTED BECAUSE THE DECISION IN *NORTH DAKOTA v. QUILL* CONFLICTS WITH THIS COURT'S RULING IN *BELLAS HESS* AND WITH DECISIONS OF OTHER STATE SUPREME COURTS.

A. *North Dakota v. Quill* Conflicts With *Bellas Hess*

The North Dakota Supreme Court's ruling in *North Dakota v. Quill* conflicts with this Court's holding in *National Bellas Hess v. Dept. of Revenue, supra.* Contrary to the suggestion of the petitioner however, the North Dakota court did not simply "refus[e] to apply" Supreme Court precedent. (Petitioner's brief, 9). Rather, noting that this Court "has not revisited this precise issue since 1967," *North Dakota v. Quill,* 490 N.W.2d at 207, Pet. App. A9[4], the Court undertook a thoughtful, detailed analysis of the factual and legal bases for *Bellas Hess,* tracing the evolution over the past quarter century both of the mail order industry and of due process and commerce clause jurisprudence. The North Dakota Court's conclusion that, given the present case and present economic and technological realities this Court would alter the holding of *Bellas Hess,* is based on sound and scholarly reasoning. Only this Court, however, can definitively resolve this issue.

Petitioner suggests in its brief that the law in this area is clear and that this Court "has consistently applied *Bellas Hess* and has never held that communicating with customers by mail or telephone is sufficient to provide tax nexus." (Petitioner's Brief, 12) The law in this area is anything but clear, *see National Geographic Society v. California Board of Equalization,* 430 U.S. 551, 561 (1977) (Blackmun, J., concurring), and, while this Court has cited *Bellas Hess* on several occca-

[4] The opinion in *North Dakota v. Quill* is contained in the Appendix to the Petitioner's Brief. References in this brief to that appendix will be to "Pet. App."

sions, it has never reconsidered that decision in the context of the issues raised by this case. *Goldberg v. Sweet,* 488 U.S. 252 (1989), cited by the petitioner, did not even address the issue of a use tax; rather, it dealt with the proper apportionment of a tax on interstate communications and therefore provides little guidance on the present issue. The other cases cited by petitioner, *D.H. Holmes Co. v. McNamara,* 486 U.S. 24 (1988), and *National Geographic Society, supra,* dealt with use tax collection by companies that admittedly maintained stores and/or offices within the taxing state. In *none* of these cases was this Court asked to reconsider the application of *Bellas Hess* to out-of-state mail order companies or to reconsider its holding in light of the tremendous technological, economic, and legal changes that have occurred in the past two decades. The important issue decided by the North Dakota Court and raised in this petition remains an open one. It warrants full briefing and argument before, and resolution by, this Court.

B. *North Dakota v. Quill* Conflicts With Decisions of Other State Supreme Courts

As noted in the previous section, the holding at issue here, that a mail order company without a physical presence in a state may constitutionally be required to collect use taxes from that state's residents, is in conflict with recent decisions of the Supreme Courts of two other states. In *SFA Folio Collections, Inc., v. Bannon, supra,* the Connecticut Supreme Court applied *Bellas Hess* to a similar set of facts and concluded that the Due Process and Commerce Clauses prohibited Connecticut from requiring a mail order company with no direct physical presence in the state to collect the Connecticut use tax on purchases made for use within Connecticut. *Id.* Similarly, the Pennsylvania Supreme Court recently affirmed a lower court decision that reached the same conclusion. *Bloomingdale's By Mail, Ltd. v. Commonwealth of Pennsylvania,* 567 A.2d 773 (Pa. Cmwlth. 1989), *aff'd per curiam,* 591 A.2d 1047 (Pa. 1991). *See also Direct Marketing Assn. v. Ben-*

net, Civ. S-88-1067, ___ F.Supp. ___ (E.D. Cal. June 28, 1991); *Lands' End, Inc. v. California State Board of Equalization*, No. 620135 Superior Court of California (appeal pending), which are at variance with the North Dakota Court's holding in *Quill* in cases raising the identical issue.

By contrast, two Chancery Court judges in Tennessee have recently distinguished *Bellas Hess* based on the enormous changes that have occurred since it was decided, and upheld a Tennessee statute similar to North Dakota's. *Bloomingdale's by Mail, Ltd. v. Huddleston, supra*, and *SFA Folio Collections, Inc. v. Huddleston, supra*. These cases are now on appeal.

Mail order companies and states alike face uncertainty concerning the collection of state use taxes. In effect, three categories of states have been created: first, Connecticut and Pennsylvania, in which the obligation to collect use taxes may not be imposed on mail order companies with no in-state physical presence; second, the state of North Dakota, in which such a duty may be imposed; and third, all other states that collect sales and use taxes, in which the law is unclear. The result is that national mail order companies will be required to collect use taxes in some states but not in others depending on differing state court interpretations of the same federal constitutional provisions.

In order to provide certainty and consistency both to state taxing authorities and to mail order companies, the *amici* urge this Court to grant certiorari and permit this issue to be fully briefed and resolved.

II. IN VIEW OF THE TECHNOLOGICAL, ECONOMIC, AND LEGAL DEVELOPMENTS WHICH HAVE OCCURRED OVER THE PAST TWO DECADES, THIS COURT SHOULD GRANT THIS PETITION IN ORDER TO REVIEW ITS HOLDING IN *NATIONAL BELLAS HESS V. DEPT OF REVENUE*.

It was nearly a quarter of a century ago that this Court decided that a mail order seller that does not maintain an actual physical presence in a state may not constitutionally be required to collect that state's sales and use tax on sales within the state. *National Bellas Hess, Inc. v. Dept. of Revenue*, 386 U.S. 753 (1967). In the twenty-four years since that decision, mail order sales have exploded into a major national industry with an economic presence in individual states that is often substantially more significant than mere physical presence. Also, in the intervening years, technological advances in computer software have rendered once complex and time-consuming tax calculations a relatively simple exercise. In light of these developments, the *amici* states urge this Court to revisit its decision in *Bellas Hess* and fashion a nexus test for state tax purposes that is consistent with the evolution of the mail order industry and current concepts of due process.

The Illinois use tax at issue in *Bellas Hess* contravened the Constitution in two related ways. First, the Court found that it violated the Due Process Clause because the mail order company had insufficient connection with, and received too little benefit from, the state to warrant the imposition of a tax collection responsibility on mail order sales. Second, the Court held that the use tax collection duty violated the Commerce Clause by placing a burden on interstate commerce unrelated to any benefits that the company received from the state. In reaching its conclusion, the Court focused primarily on the lack of physical presence by the mail order company within the taxing state and on the burden on interstate commerce caused by what the Court viewed as a "virtual welter of complicated obligations" in administering the tax collections. 386 U.S. at 759-60. In both of these areas, the passage of time has wrought significant changes which undermine the factual basis of the decision.

The focus of the first factor – the lack of a physical presence within the taxing state – reflected the then-current emphasis on physical presence as the touchstone in due process analysis. In the intervening years, however, the concept

of physical presence has been overtaken by technological, social, and economic events. The impact of current mail order companies on a state's residents has become much more dramatic and far-reaching than the mere physical presence of an agent acting on behalf of an out of state seller. Even the term "mail order company" has become obsolete, because direct marketing companies such as Quill now employ telephones, fax machines, electronic bulletin boards, and direct computer-to-computer linkups for a large percentage of their sales. Hartman, "Collection of the Use Tax on Out-of-State Mail-Order Sales," 39 Vanderbilt L.R. 993, 1007 (1986). Through the use of toll-free phone lines, with company service representatives available to customers around the clock, the modern day direct marketing companies have devised a scheme of continuous electronic solicitation and have created the functional equivalent of physical presence unknown and unimagined at the time of *Bellas Hess*.

The economic presence of these companies within targeted states is even more startling. For 1985, it is estimated that mail-order sales ranged as high as $150 *billion*,[5] with as much as $45 *billion* worth of these purchases untaxed. Hartman, *supra*, at 1006; McCray, "Overturning Bellas Hess: Due Process Considerations," 1985 B.Y.U.L. Rev. 265, n. 3. The rate of growth of direct marketing companies has been estimated at 8%-12% per year, substantially greater than the rate of growth of local retail sales. ACIR, *State and Local Taxation of Out-of-State Mail Order Sales*, 4 (April 1986).

The effect on state tax revenues is just as dramatic. The loss in tax revenue from out-of-state sales is estimated at $1 billion in 1985, and as much as $2 billion in 1988. Hartman, *supra*, at 1007; ACIR, *State and Local Taxation of Out-of-State Mail Order Sales*, Sept., 1987. The loss of in-state business due to the competitive disadvantage to local sellers who must collect sales and use taxes is incalculable.

[5] This figure stands in contrast to the $2.4 billion in mail order sales considered by the *Bellas Hess* court in 1967.

Out-of-state direct marketing companies like Quill have thus exploited and invaded local markets, and they have been successful in part due to the competitive advantage they retain over local businesses because they do not have to collect use taxes. For the petitioner to demand a continuation of this discrimination on Commerce Clause grounds is to turn the Constitution upside down. The purpose of the Commerce Clause has never been to provide an *advantage* to certain types of interstate business, but merely to create a level playing field on which both local and out-of-state businesses could compete fairly. *See Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). Nor is it "a purpose of the Commerce Clause to protect state residents from their own state taxes."[6] *Goldberg v. Sweet*, 488 U.S. at 266.

To say that mail order companies such as Quill derive no benefit from the states they target is to ignore the obvious. First and foremost, these companies enjoy a substantial and profitable economic market, a market made possible by state government policies which ensure a smoothly functioning infrastructure and economy. *Hartman, supra*, at 1014. Second, these companies depend on the target states to dispose of the hundreds of millions of catalogs they send into each state annually. The problems of garbage disposal and landfill overflow which were barely recognized at the time of *Bellas Hess* are now major environmental concerns.[7] In return for the benefits they receive, mail order companies such as Quill are being asked not to *pay* a use tax, but merely to *collect* one.

[6] The obligation to pay the use tax is on the customer who buys the product from an out-of-state seller. However, due to the practical impossibilities of collecting the tax directly from the purchaser, the customer effectively escapes paying it if the mail order companies do not collect it at the time of sale. *Hartman, supra*, at 1013.

[7] The Connecticut and North Dakota courts considered the benefit to mail order companies of a state's disposal of catalogs, and arrived at opposite conclusions. The Connecticut Supreme Court dismissed the tax commissioner's argument that the disposal provided a benefit to the companies

(continued)

The burden on interstate commerce that troubled the Court in *Bellas Hess* was the administrative burden on mail order companies of collecting and forwarding use taxes to state officials. 386 U.S. at 759-60. The technological revolution of the past twenty years, however, has fundamentally changed this burden in a way that the Court could not have foreseen. The calculation of the various sales and use tax rates for each state, which would have been extremely difficult in 1967, can be accomplished with relative ease today. Even inexpensive computer systems can now identify and update tax rates and exemptions based on the customer's zip code, compute the tax owed, and generate tax forms to be filed by the company in each taxing state. *Hartman, supra,* at 1011-12. Far from embroiling national mail order companies in "a virtual welter of complicated obligations to local jurisdictions," *Bellas Hess,* 386 U.S. at 759-60, the administrative duties associated with collecting the use tax are now no more complicated than many of the other elements involved in running a major interstate business.[8]

Ironically, the developments in computer and telecommunications technology that make multi-state tax collections feasible have been the basis for the explosive growth of the mail order industry itself. Companies such as Quill depend

[7] *(continued)*
in a two sentence footnote, holding that, because the catalogs once delivered are the property of the recipient rather than the company, the company obtains no benefit from their disposal. *SFA Folio Collections, Inc. v. Bannon, supra,* 217 Conn. at 228 n. 6. The North Dakota Court carefully considered and rejected the Connecticut Court's conclusion as "simplistic," noting that most catalogs have not been requested by, and may not be wanted by, the consumer to whom they are sent. They are mailed to him at the initiation of, and perceived advantage to, the mail order company, which must "derive[] some measure of benefit from the entity that is ultimately responsible for disposing of the veritable mountain of trash created thereby." *Quill, supra,* 470 N.W.2d. at 219, A34-A35.

[8] Notably, large retail chains with stores in every state, like Sears and J.C. Penney, which also maintain a separate mail order division, have always been obligated to collect use taxes from their mail order customers in every state. Apparently, they have been able to cope with the required paperwork and calculations.

for their very existence on the availability of sophisticated computer systems permitting them to target and reach customers throughout the nation, to process their orders efficiently, and to ship their merchandise quickly and accurately. They depend equally on space-age telecommunications systems that allow customers to place orders and receive service around the clock.

It is somewhat disingenuous for these companies, who have used computer technology to their great advantage and profit, to complain now that the burden of computing tax rates is constitutionally unendurable. The fact is that this supposed burden is no greater than other burdens associated with doing business on a multi-state basis, and is no reason to exempt these companies from the purely administrative duty of collecting and transmitting the use tax to the states whose citizens are providing their profits.

This is the reality of the present day mail order business – an economic enterprise that is light-years removed from what it was in 1967. *Bellas Hess,* with its rigid dependence on physical presence as the *sine qua non* of tax nexus,[9] remains a constitutional precedent frozen in time.

In other areas of the law, this Court has been willing to modify its traditional commerce clause analysis when technological changes have made the old rules unworkable. *See Goldberg v. Sweet,* 488 U.S. at 263-265. It has also demonstrated a willingness in the personal jurisdiction context to

[9] This limited approach is similar in concept to the approach once espoused by this Court with regard to state corporation income/franchise taxes. In *Spector Motor Service v. O'Connor,* 340 U.S. 602 (1951), the Court held that a franchise tax measured by income cannot be validly applied to a corporation conducting interstate commerce even though the tax was nondiscriminatory and fairly apportioned. In *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274 (1978), a unanimous Court overruled *Spector.* In place of a rule with "no relationship to economic realities," *id.* at 279, this Court established a comprehensive four-prong Commerce Clause analysis to be applied when interstate business is made the subject of a state tax.

move away from bright-line physical presence rules when the situation warrants, and to adopt a more flexible test that weighs all relevant factors. *See Burger King v. Rudzewicz*, 471 U.S. 462, 485-86 (1989).

The *amici* urge this Court to use this case to apply a similar, more realistic test here, one that assesses the contacts with and benefits derived from the taxing state against the burden of compliance imposed on the out-of-state company. This would more accurately reflect the economic and technological realities of the present day mail order business.

CONCLUSION

For the reasons contained herein, the *amici* urge this Court to grant certiorari in order to hear argument on and reconsider the constitutionality of requiring an out-of-state mail order company to collect use taxes on products sold to that state's residents.

RESPECTFULLY SUBMITTED,

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No. 91-194

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

QUILL CORPORATION,

Petitioner,

v.

STATE OF NORTH DAKOTA,
by and through its Tax Commissioner,
HEIDI HEITKAMP,

Respondent.

On Writ of Certiorari to the
Supreme Court of the State of North Dakota

JOINT APPENDIX

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The following have been omitted in printing this Joint Appendix. They appear in the Appendix to the Petition for Writ of Certiorari:

Memorandum Opinion of the North Dakota District Court, dated May 15, 1990 (printed in Petitioner's Appendix to the Petition for Writ of Certiorari, at p. A38).

Order For Judgment and Judgment of the North Dakota District Court, dated June 11, 1990 (printed in Petitioner's Appendix to the Petition for Writ of Certiorari, at pp. A43 and A45).

Opinion of the North Dakota Supreme Court, dated May 7, 1991 (printed in Petitioner's Appendix to the Petition for Writ of Certiorari, at p. A1).

Judgment on Remand of the North Dakota District Court, dated June 5, 1991 (printed in Petitioner's Appendix to the Petition for Writ of Certiorari, at p. A37).

No. 91-194

IN THE

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STATE OF NORTH DAKOTA,
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Respondent.

On Writ of Certiorari to the
Supreme Court of the State of North Dakota

JOINT APPENDIX

Quill Corporation v. North Dakota

DOCKET ENTRIES

District Court for Burleigh County,
South Central Judicial District

Date	*Item*
July 24, 1989	Summons
July 24, 1989	Complaint
August 21, 1989	Answer and Affirmative Defenses and Counterclaim
September 8, 1989	Plaintiff's Answer to Defendant's Counterclaim
December 18, 1989	Defendant's Motion for Partial Summary Judgment
December 18, 1989	Memorandum in Support of Defendant's Motion for Summary Judgment
December 18, 1989	Affidavit in Support of Defendant's Motion for Summary Judgment
March 8, 1990	Plaintiff's Cross-Motion for Summary Judgment
March 8, 1990	Brief in Response to Defendant's Motion For Partial Summary Judgment and in Support of Tax Commissioner's Cross-Motion for Summary Judgment
April 4, 1990	Defendant's Brief in Response to Plaintiff's Cross-Motion for Summary Judgment and Reply Brief
April 30, 1990	Plaintiff's Reply Brief

May 15, 1990	Memorandum Opinion
June 11, 1990	Judgment and Order for Judgment
June 13, 1990	Notice of Entry of Judgment
June 27, 1990	Notice of Appeal
July 3, 1990	Notice of Cross-Appeal
June 5, 1991	Judgment on Remand

DOCKET ENTRIES

North Dakota Supreme Court

Date	*Item*
August 6, 1990	Appellant's Brief and Appendix
September 24, 1990	Appellee's Brief
October 23, 1990	Reply Brief of Appellant
November 5, 1990	Reply Brief (Quill Corporation)
December 18, 1990	Oral Argument
May 7, 1991	Unanimous Opinion
May 30, 1991	Mandate
August 8, 1991	Notice of Filing Petition for Certiorari

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

IN DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT
CIVIL NO. ____

State of North Dakota, by and through its Tax Commissioner, Heidi Heitkamp,

Plaintiff,

vs.

Quill Corporation,

Defendant.

COMPLAINT

Plaintiff, State of North Dakota, through its Tax Commissioner, Heidi Heitkamp, for its demand for relief, alleges:

I.

Quill Corporation ("Quill") is a privately owned corporation.

II.

Quill's headquarters and warehouse are located in Lincolnshire, Illinois.

III.

Quill is in the business of direct mail order sales throughout the United States.

IV.

Quill is not registered to do business in North Dakota with the Secretary of State.

V.

Quill regularly and systematically solicits the consumer market in North Dakota through, among other things, distribution of catalogues into the State, use of a toll-free line for consumer orders and returns, and collection of its credit card debts and sales to North Dakota consumers.

VI.

Pursuant to N.D.C.C. § 57-40.2-01 and N.D.A.C. § 81-04.1-01-03.1, Quill is a "retailer" and a "retailer maintaining a place of business in this state."

VII.

Quill is required to obtain a North Dakota sales and use tax permit and to collect and remit North Dakota use tax on its sales into North Dakota pursuant to N.D.C.C. § 57-40.2-07.

VIII.

The State of North Dakota, through its Tax Commissioner, contacted Quill on May 5, 1989, and informed it of its obligation to obtain a North Dakota sales and use tax permit and to collect and remit North Dakota use tax (Exhibit A). Quill responded by alleging that it does not have an obligation to collect and remit North Dakota sales and use tax because it has no physical presence in North Dakota (Exhibit B).

IX.

A justiciable controversy exists because Quill failed to obtain a North Dakota sales and use tax permit and to collect and remit North Dakota use tax in violation of to [sic] N.D.C.C. §§ 57-40.2-01 and 57-40.2-07.

X.

The State of North Dakota, acting through its Tax Commissioner, brings this action pursuant to N.D.C.C. §§ 57-01-02, 57-40.2-13, and Chapter 32-23.

WHEREFORE, the State of North Dakota, through its Tax Commissioner, respectfully requests that the court declare that Quill is a "retailer" and a "retailer maintaining a place of business in this state." The State also requests executory relief to require Quill to obtain a North Dakota sales and use tax permit and collect and remit all tax, penalty and interest due from July 1, 1987.

Dated this 7th day of July 1989.

State of North Dakota
Nicholas J. Spaeth
Attorney General

/s/ Carla J. Smith
Carla J. Smith
Assistant Attorney General
Office of State Tax Commissioner
State Capitol-Eighth Floor
600 East Boulevard Avenue
Bismarck, North Dakota 58505

EXHIBIT A

May 5, 1989

Mr. Jack Miller, President
Quill Corporation
P.O. Box 5900
Lincoln Shore, Illinois 60179-5900

Mr. Arnold Miller, Treasurer
Quill Corporation
P.O. Box 5900
Lincoln Shore, Illinois 60179-5900

Gentlemen:

The North Dakota sales and use tax law defines "retailer" and "retailer maintaining a place of business" as "every person who engages in regular or systematic solicitation of a consumer market in this state by the distribution of catalogs, periodicals, advertising flyers, or other advertising, by means of print, radio or television media, by mail, telegraphy, telephone, computer data base, cable optic, microwave, or other communication system." (Attachment 1)

Any company qualifying as a North Dakota retailer under this definition must hold a North Dakota sales and use tax permit and collect and remit use tax on taxable goods sold in North Dakota.

North Dakota Century Code §57-40.2-07 provides "any retailer maintaining a place of business in this state . . . shall obtain a permit from the commissioner. . . ." The North Dakota Administrative Code §81-04.1-01-03.1 states that "[a]ny person having nexus in North Dakota and making taxable sales in or making taxable sales having a destination in North Dakota must obtain a North Dakota sales and use tax permit from the tax commissioner and collect and remit tax on these sales." (Attachment 2)

Based on a review of your North Dakota sales activity, your company is required to hold a North Dakota sales and use tax permit and collect and remit use tax on sales made into North Dakota. Enclosed is a North Dakota sales and use tax permit application. This form must be completed and returned to the Tax Commissioner's office by June 9, 1989. North Dakota sales and use tax collections should begin immediately.

Please contact me at (701) 224-3470 with any questions you may have. I will be happy to assist you in any way.

Sincerely,

Walter M. Stack
Director
Sales and Special Taxes

WMS:mdm
Attachments
cc: Heidi Heitkamp
Tax Commissioner

MAILED CERTIFIED MAIL–
RETURN RECEIPT REQUESTED

(Attachments omitted in printing)

EXHIBIT B

(Letterhead Of)

QUILL CORPORATION
100 South Schelter Rd.
Lincolnshire, IL 60069
(312) 634-4850

May 12, 1989

Mr. Walter M. Stack, Director
Sales and Special Taxes
State of North Dakota
Office of State Tax Commissioner
Bismarck, North Dakota 58505

Dear Mr. Stack:

In response to your letter of May 5, 1989, this is to inform you that Quill Corporation is engaged in the mail order sales of office supplies and equipment conducted exclusively from the States of Illinois and California. Quill Corporation owns no property and has no employees located outside of Illinois and California.

Neither Quill Corporation nor any representative of Quill Corporation conducts any business activities, maintains a place of business, or owns or leases property in North Dakota. Consequently, Quill Corporation is not subject to North Dakota income or sales taxes and is not required to collect (nor does it collect) North Dakota sales taxes.

If you have any further questions, please contact me.

Very truly yours,
QUILL CORPORATION

/s/ Arnold Miller
Arnold Miller
Treasurer

AM/sk

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

IN DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT
CIVIL NO. 41677

STATE OF NORTH DAKOTA, by and through its Tax Commissioner, HEIDI HEITKAMP, Plaintiff, vs. QUILL CORPORATION, Defendant.	ANSWER AFFIRMATIVE DEFENSES AND COUNTERCLAIM

Defendant, Quill Corporation ("Quill"), by its attorneys, McDermott, Will & Emery and Pearce and Durick, in answer to Plaintiff's Complaint admits, denies and alleges as follows:

I.

Quill Corporation ("Quill") is a privately owned corporation.

ANSWER TO PARAGRAPH I:

Admits the allegations of paragraph I of Plaintiff's Complaint.

II.

Quill's headquarters and warehouse are located in Lincolnshire, Illinois.

ANSWER TO PARAGRAPH II:

Admits the allegations of paragraph II of Plaintiff's Complaint. Quill alleges that it also maintains a warehouse in Ontario, California.

III.

Quill is in the business of direct mail order sales throughout the United States.

ANSWER TO PARAGRAPH III:

Denies the allegation of paragraph III of Plaintiff's Complaint on grounds that the phrase "direct mail order sales" is vague. Quill admits that it solicits orders of merchandise through the use of catalogs and advertising flyers which are mailed from locations outside North Dakota to customers located throughout the United States; it receives and accepts all orders for merchandise either in Illinois or California; and it ships merchandise from locations outside North Dakota to customers located throughout the United States either by mail or common carrier.

IV.

Quill is not registered to do business in North Dakota with the Secretary of State.

ANSWER TO PARAGRAPH IV:

Admits the allegations of paragraph IV of Plaintiff's Complaint. Quill alleges that it is not transacting business in North Dakota pursuant to N.D.C.C. § 10-22-01 and is not required to procure a certificate of authority from or register with the Secretary of State of North Dakota.

V.

Quill regularly and systematically solicits the consumer market in North Dakota through, among other things, distribution of catalogues into the State, use of a toll-free line for consumer orders and returns, and collection of its credit card debts and sales to North Dakota consumers.

ANSWER TO PARAGRAPH V:

Denies the allegations of paragraph V of Plaintiff's Complaint, except that Quill admits that catalogs and advertising flyers are mailed via the United States post office from locations outside of North Dakota to persons located throughout the United States, including North Dakota.

VI.

Pursuant to N.D.C.C. § 57-40.2-01 and N.D.A.C. § 81-04.1-01-03.1, Quill is a "retailer" and a "retailer maintaining a place of business in this state."

ANSWER TO PARAGRAPH VI:

Denies the allegations of paragraph VI of Plaintiff's Complaint.

VII.

Quill is required to obtain a North Dakota sales and use tax permit and to collect and remit North Dakota use tax on its sales into North Dakota pursuant to N.D.C.C. § 57-40.2-07.

ANSWER TO PARAGRAPH VII:

Denies the allegations of paragraph VII of Plaintiff's Complaint.

VIII.

The State of North Dakota, through its Tax Commissioner, contacted Quill on May 5, 1989, and informed it of its obligation to obtain a North Dakota sales and use tax permit and to collect and remit North Dakota use tax (Exhibit A). Quill responded by alleging that it does not have an obligation to collect and remit North Dakota sales and use tax because it has no physical presence in North Dakota (Exhibit B).

ANSWER TO PARAGRAPH VIII:

Admits the authenticity of the letters attached as Exhibits A and B. Quill neither admits nor denies the other allegations of paragraph VIII of Plaintiff's Complaint on the grounds that the writings speak for themselves.

IX.

A justiciable controversy exists because Quill failed to obtain a North Dakota sales and use tax permit and to collect and remit North Dakota use tax in violation of to [sic] N.D.C.C. §§ 57-40.201 [sic] and 57-40.2-07.

ANSWER TO PARAGRAPH IX:

Denies the allegations of paragraph IX of Plaintiff's Complaint, except that Quill admits that a justiciable controversy exists regarding the constitutionality of N.D.C.C. §§ 57-40.2-01 and 57-40.2-07 as applied to Quill.

X.

The State of North Dakota, acting through its Tax Commissioner, brings this action pursuant to N.D.C.C. §§ 57-01-02, 57-40.2-13, and Chapter 32-23.

ANSWER TO PARAGRAPH X:

Denies the allegations of paragraph X of Plaintiff's Complaint, except that Quill admits that this action is brought pursuant to N.D.C.C. Chapter 32-23.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

Quill, by its attorneys, for its First Affirmative Defense alleges as follows:

1. Quill Corporation is organized under the laws of Delaware, is authorized to transact business only in the States of Illinois and California, and maintains its principal place of business in Lincolnshire, Illinois. Quill warehouses merchandise only in the States of Illinois and California. Quill does not own or control any corporation or other entity and is not owned or controlled by another corporation or entity.

2. Quill mails catalogs and advertising flyers to customers located throughout the United States, including customers located in North Dakota. All catalogs and advertising flyers are mailed from locations outside North Dakota.

3. Orders for merchandise are mailed or telephoned by customers to Quill's offices in Illinois or California.

4. All orders are received and accepted by Quill in Illinois or California.

5. All goods ordered from Quill are shipped to customers from locations outside North Dakota either by mail or common carrier.

6. Quill does not own any tangible property, real or personal, in North Dakota.

7. Quill does not maintain in North Dakota any office, distribution house, sales house, warehouse or any other place of business.

8. Quill does not have in North Dakota any agent, salesman, canvasser, solicitor or other type of representative to sell or take orders, to deliver merchandise, to accept payments, or to service merchandise it sells.

9. Quill does not have a telephone listing in North Dakota, does not have a toll-free telephone line, and does not advertise its merchandise for sale in local newspapers, on billboards, or by radio or television in North Dakota.

10. All of the contacts which Quill has with the State of North Dakota are via the United States mail, common carrier or interstate telephone.

11. As applied to Quill, the provisions of N.D.C.C. Chapter 57-40.2 (including but not limited to N.D.C.C. §§ 57-40.2-01, 57-40.2-07 and N.D.A.C. § 81-04.1-01-03.1), and the related obligations to obtain a North Dakota sales and use tax permit and to collect and remit North Dakota taxes, are liabilities which impose an unconstitutional burden upon interstate commerce in violation of the Commerce Clause (article 1, section 8, clause 3 of the United States Constitution), *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), and article I, section 23 of the North Dakota Constitution.

WHEREFORE, for the following reasons, Quill prays as follows:

A. That this Court declare that the provisions of N.D.C.C. Chapter 57-40.2 (including but not limited to

N.D.C.C. §§ 57-40.2-01, 57-40.2-07 and N.D.A.C. § 81-04.1-01-03.1), as applied to Quill by the State of North Dakota acting through its Tax Commissioner, violate the Commerce Clause (article 1, section 8, clause 3) of the United States Constitution, *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), and article I, section 23 of the North Dakota Constitution;

B. That this Court declare that Quill is not required to obtain a North Dakota sales and use tax permit and is not required to collect or remit North Dakota sales and use taxes;

C. That this Court award Quill its costs and such other relief as this Court deems appropriate.

SECOND AFFIRMATIVE DEFENSE

Quill, by its attorneys, for its Second Affirmative Defense alleges as follows:

1-10. Restates and realleges paragraphs 1 to 10 inclusive of its First Affirmative Defense as paragraphs 1 to 10 inclusive of its Second Affirmative Defense.

11. As applied to Quill, the provisions of N.D.C.C. Chapter 57-40.2 (including but not limited to N.D.C.C. §§ 57-40.2-01, 57-40.2-07 and N.D.A.C. § 81-04.1-01-03.1), and the related obligations to obtain a North Dakota sales and use tax permit and to collect and remit North Dakota taxes, are liabilities which impose an unconstitutional burden on Quill in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), and article I, section 23 of the North Dakota Constitution.

WHEREFORE, for the foregoing reasons, Quill prays as follows:

A. That this Court declare that the provisions of N.D.C.C. Chapter 57-40.2 (including but not limited to N.D.C.C. §§ 57-40.2-01, 57-40.2-07 and N.D.A.C. § 81-04.1-01-03.1), as applied to Quill by the State of North Dakota acting through its Tax Commissioner, violate the Due Process Clause of the Fourteenth Amendment of the United States Constitution, *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), and article I, section 23 of the North Dakota Constitution;

B. That this Court declare that Quill is not required to obtain a North Dakota sales and use tax permit and is not required to collect or remit North Dakota sales or use taxes;

C. That this Court award Quill its costs and such other relief as this Court deems appropriate.

COUNTERCLAIM

Quill, by its attorneys, as its counterclaim against the State of North Dakota and its Tax Commissioner Heidi Heitkamp, alleges as follows:

1-10. Restates and realleges paragraphs 1 to 10 inclusive of its First Affirmative Defense as paragraphs 1 to 10 inclusive of its Counterclaim.

11. Application of N.D.C.C. Chapter 57-40.2 (including but not limited to N.D.C.C. §§ 57-40.2-01, 57-40.2-07 and N.D.A.C. § 81-04.1-01-03.1) to Quill violates the Commerce Clause (article I, section 8, clause 3 of the United States Constitution), and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967).

12. Plaintiff's determination that Quill must obtain a North Dakota sales and use tax permit, collect and remit North Dakota taxes, and incur the related obligations imposed under N.D.C.C. Chapter 57-40.2 is an action under color of the laws of the State of North Dakota and the authority of the Office of the State Tax Commissioner which constitutes an intentional deprivation of Quill's rights secured by the Due Process Clause of the Fourteenth Amendment and the Commerce Clause (article 1, section 8, clause 3) of the United States Constitution in violation of 42 U.S.C. § 1983.

WHEREFORE, Quill prays as follows:

A. That this Court declare N.D.C.C. Chapter 57-40.2 (including but not limited to N.D.C.C. §§ 57-40.2-01, 57-40.2-07 and N.D.A.C. § 81-04.1-01-03.1) unconstitutional as applied to Quill.

B. That this Court find that the State of North Dakota, by and through its Tax Commissioner, Heidi Heitkamp, acting under color of North Dakota law, intentionally denied Quill of its rights secured by the Due Process Clause of the Fourteenth Amendment and the Commerce Clause of the United States Constitution in violation of 42 U.S.C. § 1983.

C. That this Court enter a judgment against the State of North Dakota, the Office of the State Tax Commissioner under 42 U.S.C. § 1988 for the attorneys' fees and other costs incurred by Quill in defending itself from Plaintiff's attempt to deprive Quill of its constitutional rights and privileges without due process of law.

QUILL CORPORATION

By: /s/ John E. Gaggini
John E. Gaggini

John E. Gaggini
Don S. Harnack
McDermott, Will & Emery
111 West Monroe Street
Chicago, Illinois 60603
(312) 372-2000

By: /s/ William P. Pearce
William P. Pearce

William P. Pearce
Pearce and Durick
314 East Thayer Avenue
Bismarck, North Dakota 58502
(701) 223-2890

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

IN DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT
CIVIL NO. 41677

State of North Dakota, by and through its Tax Commissioner, Heidi Heitkamp, Plaintiff, vs. Quill Corporation, Defendant.	PLAINTIFF'S ANSWER TO DEFENDANT'S COUNTERCLAIM

The North Dakota Office of Tax Commissioner, through its attorney Carla J. Smith, Answers the Defendant's Counterclaim as follows:

COUNTERCLAIM NO. 1:

Quill Corporation is organized under the laws of Delaware, is authorized to transact business only in the States of Illinois and California, and maintains its principal place of business in Lincolnshire, Illinois. Quill does not own or control any corporation or other entity and is not owned or controlled by another corporation or entity.

ANSWER TO COUNTERCLAIM NO. 1:

Plaintiff admits that the Defendant's principal place of business is in Lincolnshire, Illinois. The Plaintiff does not

possess sufficient information to admit or deny the remaining allegations in paragraph 1 of the Counterclaim and therefore denies them.

COUNTERCLAIM NO. 2:

Quill mails catalogs and advertising flyers to customers located throughout the United States, including customers located in North Dakota. All catalogs and advertising flyers are mailed from locations outside North Dakota.

ANSWER TO COUNTERCLAIM NO. 2:

Plaintiff admits that Quill mails catalogs and advertisement flyers to customers located throughout the United States, including customers in North Dakota. The Plaintiff does not possess sufficient information to admit or deny the remaining allegations in paragraph 2 of the Counterclaim and therefore denies them.

COUNTERCLAIM NO. 3:

Orders for merchandise are mailed or telephoned by customers to Quill's offices in Illinois or California.

ANSWER TO COUNTERCLAIM NO. 3:

The Plaintiff does not possess sufficient information to admit or deny the allegations in paragraph 3 of the Counterclaim and therefore denies them.

COUNTERCLAIM NO. 4:

All orders are received and accepted by Quill in Illinois or California.

ANSWER TO COUNTERCLAIM NO. 4:

The Plaintiff does not possess sufficient information to admit or deny the allegations in paragraph 4 of the Counterclaim and therefore denies them.

COUNTERCLAIM NO. 5:

All goods ordered from Quill are shipped to customers from locations outside North Dakota either by mail or common carrier.

ANSWER TO COUNTERCLAIM NO. 5:

The Plaintiff does not possess sufficient information to admit or deny the allegations in paragraph 5 of the Counterclaim and therefore denies them.

COUNTERCLAIM NO. 6:

Quill does not own any tangible property, real or personal, in North Dakota.

ANSWER TO COUNTERCLAIM NO. 6:

The Plaintiff does not possess sufficient information to admit or deny the allegations in paragraph 6 of the Counterclaim and therefore denies them.

COUNTERCLAIM NO. 7:

Quill does not maintain in North Dakota any office, distribution house, sales house, warehouse or any other place of business.

ANSWER TO COUNTERCLAIM NO. 7:

The Plaintiff does not possess sufficient information to admit or deny the allegations in paragraph 7 of the Counterclaim and therefore denies them.

COUNTERCLAIM NO. 8:

Quill does not have in North Dakota any agent, salesman, canvasser, solicitor or other type of representative to sell or take orders, to deliver merchandise, to accept payments, or to service merchandise it sells.

ANSWER TO COUNTERCLAIM NO. 8:

The Plaintiff does not possess sufficient information to admit or deny the allegations in paragraph 8 of the Counterclaim and therefore denies them.

COUNTERCLAIM NO. 9:

Quill does not have a telephone listing in North Dakota, does not have a toll-free telephone line, and does not advertise its merchandise for sale in local newspapers, on billboards, or by radio or television in North Dakota.

ANSWER TO COUNTERCLAIM NO. 9:

The Plaintiff does not possess sufficient information to admit or deny the allegations in paragraph 9 of the Counterclaim and therefore denies them.

COUNTERCLAIM NO. 10:

All of the contacts which Quill has with the State of North Dakota are via the United States mail, common carrier or interstate telephone.

ANSWER TO COUNTERCLAIM NO. 10:

The Plaintiff does not possess sufficient information to admit or deny the allegations in paragraph 10 of the Counterclaim and therefore denies them.

COUNTERCLAIM NO. 11:

Application of N.D.C.C. Chapter 57-40.2 (including but not limited to N.D.C.C. §§ 57-40.2-01, 57-40.2-07 and N.D.A.C. § 81-04.1-01-03.1) to Quill violates the Commerce Clause (article I, section 8, clause 3 of the United States Constitution), and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967).

ANSWER TO COUNTERCLAIM NO. 11:

The Plaintiff denies the allegations in paragraph 11 of the Counterclaim.

COUNTERCLAIM NO. 12:

Plaintiff's determination that Quill must obtain a North Dakota sales and use tax permit, collect and remit North Dakota taxes, and incur the related obligations imposed under N.D.C.C. Chapter 57-40.2 is an action under color of the laws of the State of North Dakota and the authority of the Office of the State Tax Commissioner which constitutes an intentional deprivation of Quill's rights secured by the Due Process Clause of the Fourteenth Amendment and the Commerce Clause (article I, section 8, clause 3) of the United States Constitution in violation of 42 U.S.C. § 1983.

ANSWER TO COUNTERCLAIM NO. 12:

The Plaintiff denies the allegations in paragraph 12 of the Counterclaim.

AFFIRMATIVE DEFENSES

The Plaintiff, through its attorney, for its Affirmative Defenses alleges:

I.

The Defendant's claim against the Plaintiff in her official capacity as Tax Commissioner for the State of North Dakota is barred by the Eleventh Amendment of the United States Constitution and the Doctrine of Sovereign Immunity.

II.

The Defendant's claim as it may relate to Heidi Heitkamp individually is barred as she is entitled to qualified immunity under 42 U.S.C. §1983.

III.

The Defendant's claim fails to state a claim upon which relief may be granted.

WHEREFORE, the Plaintiff respectfully requests that the Defendant's Counterclaim be dismissed.

Dated this 7th day of September 1989.

State of North Dakota
Nicholas J. Spaeth
Attorney General

/s/ Carla J. Smith
Carla J. Smith
Assistant Attorney General
Office of State Tax Commissioner
State Capitol
600 East Boulevard Avenue
Bismarck, North Dakota 58505-0599
(701) 224-2781

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

IN DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT
CIVIL NO. 41677

STATE OF NORTH DAKOTA, by and through its Tax Commissioner, HEIDI HEITKAMP,

Plaintiff,

vs.

QUILL CORPORATION,

Defendant.

DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendant, Quill Corporation ("Quill"), by its attorneys, McDermott, Will & Emery and Pearce & Durick, pursuant to Rule 56 of the North Dakota Code of Civil Procedure, hereby moves for entry of summary judgment in its favor on issues of law raised by the Complaint, Answer and Affirmative Defenses to the Complaint[1] (hereinafter referred to as "Complaint").

In support of this Motion, Quill states that there is no genuine issue as to any material fact regarding the Complaint and submits herewith the sworn Affidavit of Ar-

[1] At this time Quill does not move for summary judgment on issues raised by its Counterclaim.

nold Miller (Treasurer of Quill),[2] Quill's Responses to Plaintiff's First Set of Interrogatories,[3] and a Memorandum of Law in support of this Motion.

Quill respectfully submits that it is entitled as a matter of law to a judgment declaring that it is not required to obtain a North Dakota sales and use tax permit and is not required to collect or remit North Dakota sales or use taxes.

WHEREFORE, Quill requests:

A. That this Court issue an order establishing a schedule for briefing, hearing and ruling on the Motion for Summary Judgment, allowing Plaintiff thirty (30) days to respond to Quill's Motion, allowing Quill fourteen (14) days to reply and setting oral argument within seven (7) days of Quill's reply;

B. That this Court declare that the provisions of N.D.C.C. Chapter 57-40.2 (including but not limited to N.D.C.C. §§ 57-40.2-01, 57-40.2-07 and N.D.A.C. § 81-04.1-01-03.1), as applied to Quill by the State of North Dakota acting through its Tax Commissioner, violate the Commerce Clause (article 1, section 8, clause 3), the Due Process Clause of the Fourteenth Amendment of the United States Constitution, *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), and article I, section 23 of the North Dakota Constitution;

C. That this Court declare that Quill is not required to obtain a North Dakota sales and use tax permit and is not required to collect or remit North Dakota sales and use taxes; and

[2] Attached as Exhibit A and hereinafter referred to as Affidavit.

[3] Attached as Exhibit B.

D. That this Court award Quill such other relief as this Court deems appropriate.

Respectfully submitted,
QUILL CORPORATION

By: /s/ William P. Pearce
One of its Attorneys

Dated: December 15, 1989

John E. Gaggini
Don S. Harnack
McDermott, Will & Emery
111 West Monroe Street
Chicago, Illinois 60603
(312) 372-2000

William P. Pearce
Pearce & Durick
314 East Thayer Avenue
Bismarck, North Dakota 58502
(701) 233-2890

(Exhibit A follows. Exhibit B omitted in printing.)

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

IN DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT
CIVIL NO. 41677

STATE OF NORTH DAKOTA, by and through its Tax Commissioner, HEIDI HEITKAMP,

Plaintiff,

vs.

QUILL CORPORATION,

Defendant.

AFFIDAVIT IN SUPPORT
OF DEFENDANT
QUILL CORPORATION'S
MOTION FOR SUMMARY JUDGMENT

Arnold Miller, being duly sworn according to law, deposes and says that he is Treasurer of Quill Corporation; that Affiant has personal knowledge of the contents of and is authorized to make this affidavit; and that Affiant, if sworn as a witness, could competently testify to the facts herein set forth. Affiant in support of Defendant's Motion for Summary Judgment, states as follows:

1. Defendant Quill Corporation (hereinafter "Quill") is a corporation organized under the laws of the State of Delaware. Quill maintains its principal place of business in Lincolnshire, Illinois and maintains offices and warehouse facilities only in the States of Illinois and California.

2. Quill is registered as a foreign corporation and is qualified to do business only in the States of Illinois and California.

3. Quill has not procured a certificate of authority or registered to do business in North Dakota. Quill has appointed no registered agent to act on its behalf in North Dakota and has not authorized any person to apply for, receive or accept any licenses or permits in North Dakota.

During the period July 1, 1987 through June 30, 1989:

4. Quill solicited sales of office products through catalogs and advertising flyers mailed from points outside North Dakota to persons located throughout the United States.

5. Orders for merchandise were received via mail, telephone, telecopy or telex from customers located in approximately every zip code within the United States including North Dakota. Quill received and accepted or rejected all orders for merchandise only at its offices in Illinois and California. All correspondence with customers in connection with their orders was conducted from Illinois or California.

6. All merchandise was shipped to customers only by mail or common carrier. All merchandise was shipped to North Dakota customers from locations outside North Dakota. All merchandise returned by customers to Quill was shipped by mail or common carrier.

7. The shipping methods used by Quill were limited to Parcel Post, UPS, and other common carrier freight lines. Quill did not deliver merchandise to customers (or pick up merchandise from customers) in North Dakota in Quill owned or leased vehicles.

8. Invoices for merchandise shipped to customers were mailed to customers usually within one day of the shipment. An invoice was mailed for each shipment of merchandise to a customer.

9. An open account was established by Quill for customers who ordered merchandise.

10. Customer payments for Quill merchandise were made by personal, business, certified, or cashiers check. Quill did not accept payment by credit card, did not provide to customers its own credit card or charge account, and did not extend any other credit to its customers.

11. All payments for merchandise were received by Quill at its Lincolnshire, Illinois, or its Ontario, California offices. Quill never received any payment for merchandise purchased by North Dakota customers in North Dakota nor did any person or entity on behalf of Quill receive payment in North Dakota from any Quill customer.

12. Quill did not employ any credit or collection agents which operated in North Dakota to collect delinquent accounts or dishonored checks, or to repossess merchandise from customers. Any collection inquiries initiated by Quill personnel were conducted by mail or telephone from Quill's Illinois and California offices.

13. Quill did not engage any credit bureau located in North Dakota to determine the creditworthiness of any of its customers. All credit inquiries were conducted by Quill employees by mail or telephone from Quill's Illinois and California offices.

14. Quill did not file any lawsuits or institute any other action in any North Dakota court.

15. Quill did not maintain an account with any North Dakota bank or financial institution.

16. Quill did not maintain, hold, or use, temporarily or permanently, directly or through an agent, any office, distribution point, sales house or sample room, warehouse, storage place, other physical location or place of business in North Dakota.

17. Quill did not have any employee, representative, agent, salesman, independent contractor, canvasser, solicitor or other person of any kind act or operate in North Dakota for the purpose of selling, soliciting, or taking orders for merchandise, delivering merchandise, accepting payments or deposits, servicing, repairing or installing merchandise, or performing any other services on behalf of Quill in North Dakota.

18. Quill did not own or retain title or any security interest in any tangible property, real or personal, located in North Dakota.

19. Quill did not own or lease any motor vehicles located or used in North Dakota, nor did it hold title, license or other registration for any vehicle used in North Dakota.

20. Quill did not purchase any merchandise from North Dakota manufacturers for resale to Quill customers.

21. Quill owned no interest in any company that operated in North Dakota. No company owned any interest in Quill.

22. Quill sold office products which were described and offered for sale in its catalogs and advertising flyers. The printing and mailing of Quill's catalogs and advertising flyers were conducted from locations outside North Dakota.

23. Quill did not conduct any design, preparation publication, printing, distribution or mailing of catalogs and advertising flyers in North Dakota nor did any agent,

employee, or representative of Quill perform any design, preparation, publication, printing, distribution, or mailing activities on behalf of Quill in North Dakota.

24. Quill advertised in nationally circulated magazines.

25. Quill did not advertise in newspapers, it did not advertise in magazines which were distributed on a local basis in North Dakota, and it did not advertise in any publication published in North Dakota.

26. Quill did not solicit or advertise by radio, cable or network television, or newspaper in North Dakota. Quill did not solicit sales by means of telegraphy, computer data base, optic, microwave, or similar communication systems owned by Quill and located in North Dakota.

27. Quill did not list any "800", toll-free or WATTS line number in its catalogs or advertisements for customers to use in ordering merchandise.

28. Quill has no answering service in North Dakota and never maintained any telephone listing in North Dakota.

29. Quill never held any meetings or conducted any seminars or training courses in North Dakota.

30. Quill never licensed any intangible rights, or authorized any licensee, franchisee, dealer or distributor to operate under the Quill name or otherwise offer Quill merchandise in North Dakota.

31. Quill never maintained a post office box in North Dakota.

32. Quill never displayed, advertised by display or promoted by demonstration or seminar its merchandise in North Dakota.

33. Quill never advertised on billboards located in North Dakota.

34. Quill never arranged or participated in any cooperative advertising with anyone in North Dakota.

35. Quill never performed any services in North Dakota.

FURTHER, Affiant sayeth not.

/s/ Arnold Miller
Arnold Miller, Affiant

SUBSCRIBED AND SWORN TO
before me this 8th day
of December, 1989.

/s/ Marilyn R. Sherman
Notary Public

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

IN DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT
CIVIL NO. 41677

State of North Dakota, by and through its Tax Commissioner, Heidi Heitkamp,	)	
Plaintiff,	)	PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT
vs.	)	
Quill Corporation,	)	
Defendant.	)	

Plaintiff, State of North Dakota, through its Attorney General Nicholas J. Spaeth and its attorneys Carla J. Smith and Robert W. Wirtz, moves for summary judgment pursuant to Rule 56 of the North Dakota Code of Civil Procedure in its favor upon the pleadings, affidavits and exhibits submitted in this matter.

In support of its motion, Plaintiff states the following:

1. Plaintiff relies upon two principle bases to support its position. The first basis rests upon traditional notions of nexus that are factually conceded by the Quill Corporation ("Quill") and thus present no genuine issues of fact to be resolved. Quill has chosen methods of direct marketing its products in North Dakota that result in Quill having contacts with North Dakota in excess of those arguably protected by *National Bellas Hess v. Department of Revenue*, 386 U.S. 753 (1967). These contacts

result in Quill having approximately $1,000,000 of its property annally located in North Dakota. Therefore, the State of North Dakota may constitutionally require Quill to collect use tax under N.D.C.C. §57-40.2-01(7).

2. The second basis is founded on the principle that Quill conducts regular and systematic solicitation of North Dakota's consumer market to a sufficient degree that creates an "economic presence" in the state. This economic presence is the constitutional equivalent of physical presence necessary to require Quill to collect North Dakota's use tax from its customers.

3. In further support of its Motion for Partial Summary Judgment, Plaintiff submits the Exhibits to the Tax Commissioner's Brief in Response to Quill's Motion for Partial Summary Judgment and in Support of the Tax Commissioner's Cross-Motion for Summary Judgment and the Deposition Exhibits.

WHEREFORE, Plaintiff State of North Dakota respectfully requests that the Court:

a. Find that during the period from July 1, 1987 to the present, Quill utilized the method of selling its products in North Dakota on the basis of sales "on approval" under N.D.C.C. §41-02-43(1)(a); and, therefore, Quill retained title and risk of loss relating to its property under N.D.C.C. §41-02-44(1) on approximately $1,000,000 of property annually for ninety days following receipt of the merchandise by the North Dakota customer or until it was returned to Quill. Therefore, Quill had personal property located in North Dakota.

b. Find that, while Quill's property was located in North Dakota, Quill and its property received

benefits and protections afforded by North Dakota government services.

c. Find that Quill regularly and systematically solicited sales of tangible personal property in the State of North Dakota by telephone and through the use of catalogs, periodicals and advertising flyers pursuant to N.D.C.C. §57-40.2-01.

d. Find that Quill's contacts with the State of North Dakota are such that Quill has purposefully availed itself of North Dakota's consumer market and has created an economic presence within the state that is the equivalent of Quill being a local merchant.

e. That Quill is a "retailer" and a "retailer maintaining a place of business" in North Dakota and is required pursuant to N.D.C.C. ch. 57-40.2 to obtain a North Dakota sales and use tax permit and to collect and remit use tax on its retail sales of goods delivered into North Dakota since July 1, 1987.

f. Declare that N.D.C.C. ch. 57-40.2, as applied to Quill, does not violate either the Due Process Clause of the Fourteenth Amendment or the Commerce Clause of the United States Constitution, or Article I, §23 of the North Dakota Constitution.

g. Enter an order for such other relief as the Court deems appropriate.

Dated this 5th day of March, 1990, at Bismarck, North Dakota.

/s/ Carla J. Smith
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(Exhibits omitted in printing.)

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

IN DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT
CIVIL NO. 41677

State of North Dakota, by and through its Tax Commissioner, Heidi Heitkamp,	)	AFFIDAVIT OF TAX COMMISSIONER HEIDI HEITKAMP IN SUPPORT OF THE TAX COMMISSIONER'S CROSS-MOTION FOR SUMMARY JUDGMENT
Plaintiff,	)	
vs.	)	
Quill Corporation,	)	
Defendant.	)	

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH—ss

Heidi Heitkamp, having been duly sworn, states that:

1. I am the Tax Commissioner for the State of North Dakota.

2. I requested Research Analyst Kathy Strombeck to compile a document indicating the taxable sales for 1988 of all office product and equipment businesses holding a North Dakota sales and use tax permit.

3. The document I received in response to my request is attached to this Affidavit as Exhibit A.

4. Based upon a comparison of Exhibit A and Quill's taxable sales for 1988 as indicated in their Answer to the Tax Commissioner's First Set of Interrogatories, Quill

would rank sixth of thirty-three such retailers in North Dakota if it were collecting and remiting use tax on its sales into North Dakota.

5. Quill does not remit use tax on its sales into North Dakota.

6. The names and permit numbers in Exhibit A have been deleted due to the secrecy provisions in N.D.C.C. §§ 57-39.2-23 and 57-40.2-13.

/s/ Heidi Heitkamp
Heidi Heitkamp
TAX COMMISSIONER

Subscribed and sworn to before me this 5th day of March, 1990.

/s/ June Veit
Notary Public

EXHIBIT A

NAME	PERMIT	CY-1988 TAXABLE SALES
Company A	000000	$1,600,023
Company B	000000	1,423,556
Company C	000000	1,394,814
Company D	000000	1,154,023
Company E	000000	1,114,916
Company F	000000	963,895
Company G	000000	917,829
Company H	000000	870,277
Company I	000000	782,346
Company J	000000	771,086
Company K	000000	688,289
Company L	000000	661,741
Company M	000000	640,641
Company N	000000	623,552
Company O	000000	586,790
Company P	000000	522,301
Company Q	000000	497,535
Company R	000000	495,814
Company S	000000	484,414
Company T	000000	475,681
Company U	000000	462,333
Company V	000000	437,166
Company W	000000	419,878
Company X	000000	412,916
Company Y	000000	398,849
Company Z	000000	396,609
Company AA	000000	359,212
Company BB	000000	309,735
Company CC	000000	189,581
Company DD	000000	126,996
Company EE	000000	100,182
Company FF	000000	77,706
Company GG	000000	43,471
		$20,404,157

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

IN DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT
CIVIL NO. 41677

State of North Dakota, by and through its Tax Commissioner, Heidi Heitkamp, Plaintiff, vs. Quill Corporation, Defendant.	AFFIDAVIT OF KATHY STROMBECK IN SUPPORT OF THE TAX COMMISSIONER'S CROSS-MOTION FOR SUMMARY JUDGMENT

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH—ss

Kathy Strombeck, having been duly sworn, states that:

1. I am the Research Analyst for the North Dakota Office of Tax Commissioner. I have been in this position for six years.

2. Tax Commissioner Heidi Heitkamp requested that I prepare a document indicating the annual taxable sales for 1988 for all office product and equipment businesses holding a North Dakota sales and use tax permit.

3. The data was extracted from the North Dakota sales tax base using SIC codes that relate to office product and supply businesses.

4. Exhibit A attached to this Affidavit is the data compiled as a result of the Tax Commissioner's request.

/s/ Kathy Strombeck
Kathy Strombeck

Subscribed and sworn to before me this 5th day of March, 1990.

/s/ June Veit
Notary Public

EXHIBIT A

NAME	PERMIT	CY-1988 TAXABLE SALES
Company A	000000	$1,600,023
Company B	000000	1,423,556
Company C	000000	1,394,814
Company D	000000	1,154,023
Company E	000000	1,114,916
Company F	000000	963,895
Company G	000000	917,829
Company H	000000	870,277
Company I	000000	782,346
Company J	000000	771,086
Company K	000000	688,289
Company L	000000	661,741
Company M	000000	640,641
Company N	000000	623,552
Company O	000000	586,790
Company P	000000	522,301
Company Q	000000	497,535
Company R	000000	495,814
Company S	000000	484,414
Company T	000000	475,681
Company U	000000	462,333
Company V	000000	437,166
Company W	000000	419,878
Company X	000000	412,916
Company Y	000000	398,849
Company Z	000000	396,609
Company AA	000000	359,212
Company BB	000000	309,735
Company CC	000000	189,581
Company DD	000000	126,996
Company EE	000000	100,182
Company FF	000000	77,706
Company GG	000000	43,471
		$20,404,157

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

IN DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT
CIVIL NO. 41677

STATE OF NORTH DAKOTA, by and through its Tax Commissioner, HEIDI HEITKAMP,

Plaintiff,

vs.

QUILL CORPORATION,

Defendant.

AFFIDAVIT OF ARNOLD MILLER
IN SUPPORT OF
DEFENDANT QUILL CORPORATION'S
RESPONSE TO PLAINTIFF'S
CROSS-MOTION FOR SUMMARY JUDGMENT

ARNOLD MILLER, being duly sworn according to law, deposes and states as follows:

This Affidavit is made on my personal knowledge. If sworn as a witness at the trial of the above-captioned case, I could competently testify to the following facts:

1. I am Treasurer of Quill Corporation (hereinafter "Quill").

2. Quill is a corporation organized under the laws of the State of Delaware and maintains its principal place of business in Lincolnshire, Illinois. Quill sells various office products and certain food products to customers lo-

cated throughout the United States, primarily to business firms and a large number of charitable organizations, governmental entities, health related institutions and organizations.

Q-Tech Computers:

3. Everex Corporation, a company unrelated to Quill, manufactures personal computers under the trade name Q-Tech.

4. Quill buys Q-Tech personal computers from Everex Corporation and resells them to customers located throughout the United States, including customers located in North Dakota. All computers sold by Quill are shipped to customers by common carrier.

5. If dissatisfied, any customer who purchases a computer can return the computer to Quill for refund, credit, or replacement.

6. Any computer returned to Quill by any customer is shipped by common carrier.

7. Quill employs individuals described as "Products Specialists" who are located in Lincolnshire, Illinois and who are available to communicate by telephone with customers who call Quill with questions regarding merchandise purchased, including Q-Tech computers.

8. Quill's catalogs and advertising brochures advertise that any customer may purchase a service contract to cover the repair of Q-Tech computers.

9. Everex Corporation sells On Site Warranty Service Agreements (hereinafter referred to as "service agreements") to customers located throughout the United States.

10. Quill buys service agreements from Everex and resells them.

11. National Computer Systems (hereinafter referred to as "NCS") is a computer service company, unrelated to Quill, which performs computer repair services on personal computers, including Q-Tech computers.

12. Quill does not hold any right or interest in or have authority to exercise control over NCS or Everex. Neither Everex nor NCS hold any right or interest in or have authority to exercise any control over Quill.

13. Customers who choose to purchase an NCS service agreement for computer repair services contract directly with NCS.

14. The customer is responsible for contacting NCS directly for the performance of computer repair services under contract with NCS.

15. All services performed by NCS for customers who purchase Q-Tech computers is rendered solely on behalf of the customer and the customer is solely responsible to pay NCS for services performed by NCS.

16. Any profits arising from computer services performed by NCS accrues solely to the benefit of NCS.

17. Quill does not receive any payments from Everex, NCS or customers attributable to computer services performed by NCS.

18. All computer repair services performed by NCS are performed by the agents, representatives or employees of NCS.

19. NCS is not authorized to act as an agent or representative of Quill nor is any NCS employee or representative authorized to act as an agent or representative of Quill.

20. Quill does not have any agents, employees or other representatives performing any repair or other services on Q-Tech computers or on any other merchandise sold to customers located in North Dakota or any other state.

Quill-Service-Link:

21. Quill sells a computer software program called Quill-Service-Link (hereinafter referred to as "QSL") to customers located throughout the United States.

22. Quill requires that users of QSL follow certain rules when using the OFFICE EXPERT Bulletin Board System (hereinafter also referred to as "Bulletin Board") function of QSL. OFFICE EXPERT is an electronic bulletin board that allows one user to communicate by means of telephone communication via computer modem with other users of QSL. One of the restrictions of QSL prohibits users from publishing any profane, abusive or offensive language on the Bulletin Board.

23. Quill retains the right to cancel the access account number of any QSL user who violates the rules for use of the Bulletin Board.

24. Quill has never cancelled the Bulletin Board access privileges of any QSL user or requested the return of any QSL computer software program sold to any customer.

25. Quill does not own or hold any interest in or title to any computer modems in North Dakota.

Telephone Price Survey:

26. Quill does not conduct any telephone price survey or otherwise place telephone calls to any North Dakota vendor in order to competitively price Quill merchandise.

27. Quill obtains information regarding merchandise prices charged by various office supply vendors located throughout the United States by reviewing the catalogs and advertisements of these office supply vendors. Such review is performed by Quill employees located at Quill's headquarters in Lincolnshire, Illinois.

28. No Quill employee, representative or agent has ever entered North Dakota to obtain information for Quill or to conduct any business on behalf of Quill.

FURTHER, AFFIANT SAYETH NOT.

/s/ Arnold Miller
Arnold Miller, Affiant

STATE OF ILLINOIS
COUNTY OF COOK—ss:

I, the undersigned, a Notary Public in and for said County, in the State of aforesaid, DO HEREBY CERTIFY that Arnold Miller, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person, and acknowledged that he signed the said instrument as his free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and official seal, this 30th day of March, 1990.

/s/ Orchid Farales
Notary Public

My commission expires: 5-10-92

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

IN DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT
CIVIL NO. 41677

STATE OF NORTH DAKOTA, by and through its Tax Commissioner, HEIDI HEITKAMP,

Plaintiff,

vs.

QUILL CORPORATION,

Defendant.

AFFIDAVIT OF THOMAS J. CURRY
IN SUPPORT OF
DEFENDANT QUILL CORPORATION'S
RESPONSE TO PLAINTIFF'S
CROSS-MOTION FOR SUMMARY JUDGMENT

THOMAS J. CURRY, being duly sworn according to law, deposes and states as follows:

This Affidavit is made on my personal knowledge. If sworn as a witness at the trial of the above-captioned case, I could competently testify to the following facts:

1. I currently reside at 382 North Gate Road, Lindenhurst, Illinois 60046.

2. I was employed as Assistant Circulation Manager and ultimately promoted to Vice President of Circulation/Marketing with National Bellas Hess, Inc. from 1954 through 1969 and I have personal knowledge of the operation of that company during that period.

3. National Bellas Hess, Inc. was a Delaware Company and maintained its principal place of business in North Kansas City, Missouri.

4. National Bellas Hess, Inc. solicited sales of merchandise by mailing catalogs and advertising flyers to customers located throughout the United States.

5. Customers ordered merchandise from National Bellas Hess by mail and by telephone.

6. National Bellas Hess, Inc. advertised a "Complete Satisfaction" guarantee in its catalogs which stated that:

> "We [National Bellas Hess, Inc.] guarantee that everything you [customer] see in our catalog is exactly as pictured and described. We guarantee our merchandise to be first quality at the lowest possible prices. We guarantee if, for any reason, you find any item not completely satisfactory, you may return it and we will exchange it or immediately REFUND YOUR MONEY!" [Bracketed materal added]

7. The National Bellas Hess, Inc. "Complete Satisfaction" guarantee was advertised in the company's 1966 Spring Sale catalog. A true and correct photocopy of the cover page and advertised guarantee from the referenced catalog are attached hereto as Exhibit 1. A true and correct photocopy of a National Bellas Hess Spring 1970 catalog is attached hereto as Exhibit 2.

8. The "Complete Satisfaction" guarantee advertised by National Bellas Hess, Inc. in its 1966 and 1970 Spring Sale catalogs was the same guarantee advertised by National Bellas Hess from 1954 through 1969.

FURTHER, AFFIANT SAYETH NOT.

/s/ Thomas J. Curry
Thomas J. Curry, Affiant

Dated: March 30, 1990

STATE OF WISCONSIN
COUNTY OF KENOSHA–ss:

I, the undersigned, a Notary Public in and for said County, in the State of aforesaid, DO HEREBY CERTIFY that Thomas J. Curry, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person, and acknowledged that he signed the said instrument as his free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and official seal, this 30th day of March, 1990.

/s/ Carol A. Schoenbeck
Notary Public

My commission expires: 4-15-90

(Exhibits omitted in printing)

SUPREME COURT OF THE UNITED STATES

No. 91-194

Quill Corporation,

Petitioner

v.

North Dakota by and through its Tax Commissioner, Heidi Heitkamp

ORDER ALLOWING CERTIORARI.
Filed October 7, 1991.

The petition herein for a writ of certiorari to the Supreme Court of North Dakota is granted limited to Question 1 presented by the petition. The case is set for oral argument in tandem with No. 91-119, *Wisconsin Department of Revenue* v. *William Wrigley, Jr., Co.*

October 7, 1991

Supreme Court, U.S.
FILED
NOV 21 1991
OFFICE OF THE CLERK

(10)

No. 91-194

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

QUILL CORPORATION,

Petitioner,

v.

STATE OF NORTH DAKOTA,
by and through its Tax Commissioner,
HEIDI HEITKAMP,

Respondent.

On Writ of Certiorari to the
Supreme Court of the State of North Dakota

BRIEF FOR PETITIONER

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PETITION FOR CERTIORARI FILED AUGUST 2, 1991
CERTIORARI GRANTED OCTOBER 7, 1991

91

QUESTION PRESENTED

Whether the North Dakota Supreme Court is obligated to follow the longstanding precedent of *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), in a case that is factually indistinguishable from *Bellas Hess*?

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No. 91-194

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

QUILL CORPORATION,

Petitioner,

v.

STATE OF NORTH DAKOTA,
by and through its Tax Commissioner,
HEIDI HEITKAMP,

Respondent.

On Writ of Certiorari to the
Supreme Court of the State of North Dakota

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Supreme Court of the State of North Dakota is reported at 470 N.W.2d 203 (1991), and is reprinted in the Appendix to the Petition for Writ of Certiorari (hereinafter referred to as "Pet. App.") A1-A36.

The Memorandum Opinion of Judge Graff of the District Court for the South Central Judicial District, County of Burleigh, State of North Dakota, was issued on May 15, 1990 (N. Dakota State Tax Reporter (CCH) ¶ 200-376) and is reprinted at Pet. App. A38-A42.

JURISDICTION

This action was brought by the State of North Dakota ("North Dakota") against Quill Corporation ("Quill")[1] for taxes alleged to be due under the North Dakota Sales and Use Tax Act, as amended (Sections 57-40.2-01(6) and (7), N.D. Cent. Code (Supp. 1989) and regulations promulgated thereunder. (N.D. Admin. Code § 81-04.1-01-03.1 (1987).) (Joint Appendix, "J.A." 3, 6.)

The Supreme Court of North Dakota entered judgment on May 7, 1991 and no rehearing was requested. Petitioner timely filed its Petition for Writ of Certiorari under 28 U.S.C. § 1257(a), invoking the jurisdiction of this Court to review the judgment of the North Dakota Supreme Court.

On October 7, 1991, this Court granted a writ of certiorari limited to Question 1 presented by the petition. (J.A. 52.)

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[1] Pursuant to Supreme Court Rule 29.1, the Court is advised that Quill is neither the parent nor the subsidiary of any other company.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional, statutory and regulatory provisions:

U.S. Const. art. I, § 8, cl. 3
U.S. Const. art. VI, ¶¶ 2 and 3
U.S. Const. amend. XIV, § 1
N.D. Cent. Code § 57-40.2-01(6) and (7) (Supp. 1989)
N.D. Admin. Code § 81-04.1-01-03.1 (1987)

The text of these provisions and related sections of the North Dakota Sales and Use Tax Acts are reproduced in Pet. App. A46-A57.

STATEMENT OF THE CASE

North Dakota enacted legislation which required Quill to register under the North Dakota Sales and Use Tax Act as a "retailer" maintaining a place of business in North Dakota and to obtain a North Dakota sales and use tax permit to collect and remit North Dakota use taxes on sales made by mail and telephone to North Dakota customers, even though Quill had no physical presence and conducted no local activity in North Dakota. (J.A. 3-7.)

The North Dakota Use Tax.

In 1987 North Dakota enacted legislation expanding the reach of the North Dakota sales/use tax laws to:

> every person who engages in regular or systematic solicitation of a consumer market in this state by the distribution of catalogs, periodicals, advertising flyers, or other advertising, or by means of print, radio or television media, by mail, telegraphy, telephone, computer data base, cable optic, microwave, or other communication system.[2]

North Dakota's Administrative Code § 81-04.1-01-03.1 defines the term "regular or systematic solicitation" to include three or more separate mailings of any advertisement during a specified twelve month period. (Pet. App. A56.) The 1987 statute requires any out-of-state vendor who satisfies this statutory definition to register as a "retailer" under the North Dakota sales/use tax acts, to obtain a North Dakota sales/use tax registration permit, and to be subject to North Dakota use tax collection obligations and all other regulatory provisions under the North Dakota sales and use tax acts including remitting the tax whether or not it is actually collected. These burdens are imposed even though the out-of-state vendor maintains no property and conducts no localized business activity within the state. (Pet. App. A47-A57.)[3]

Quill's Business.

Quill is a national mail order vendor selling office supplies, stationery and office equipment. Quill is incorporated in Delaware and maintains its principal place of business in Lincolnshire, Illinois. (J.A. 28.) Quill's only offices,

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[2] The definition of "retailer" under Section 57-40.2-01(6), N.D. Cent. Code (Supp. 1989) was amended in 1987. The definition of "[r]etailer maintaining a place of business in this state" was also amended to include substantially the same activities as defined above. N.D. Cent. Code § 57-40.2-01(7) (Supp. 1989) (Pet. App. A47-A48).

[3] Prior to 1987, the terms "retailer" and "retailer maintaining a place of business in [North Dakota]" were applied only to persons having a "physical presence" in the state such as an office, distribution house, sales house, warehouse, salesperson or agent. N.D. Cent. Code § 57-40.2-01(6) and (7) (prior to 1987 amendments). North Dakota did not require registration and did not impose use tax collection or payment obligations on out-of-state mail order vendors absent a physical presence in the state. (Pet. App. A58-A66.)

warehouses and employees are located in Illinois, California and Georgia. Quill is authorized to transact business only in those states. (J.A. 29.)

Quill solicits sales through catalogs and advertising flyers mailed to customers throughout the United States, including customers located in North Dakota. (J.A. 29.) Twice a year Quill mails catalogs from Illinois to a list of approximately 2,300 customers located in North Dakota. (R. 95.) During the year, Quill also mails out and encloses with merchandise smaller intermediate sales books and flyers. (R. 95.) Quill receives orders from customers by mail and telephone (including fax, telecopy, telex and electronic mail[4]) at its Illinois, California and Georgia locations. (J.A. 29.) All communications with customers in connection with their orders is conducted from Illinois, California and Georgia. (J.A. 29.) Quill ships merchandise to fill orders by United States mail or common carrier from locations outside North Dakota. (J.A. 29.)

Quill has no physical presence in North Dakota. Quill does not own any real or personal tangible property in North Dakota and does not maintain any office, distribution point, sales house, warehouse or other place of business in North Dakota. (J.A. 31.) Quill does not have any agent, salesman, employee, representative, independent contractor, canvasser, solicitor or other person of any kind soliciting sales or otherwise acting on its behalf in North Dakota. (J.A. 31.) Quill does not store inventory or merchandise in North Dakota and does not retain any security interest in merchandise sold to North Dakota customers. (J.A. 31.) Quill does not have any telephone listing, toll-free telephone line, "800" number or WATS line in North Dakota. (J.A. 32.) Quill does not have a bank account in North Dakota. (J.A. 30.) Quill does not advertise by radio

[4] Electronic mail is a term to describe computer communication via telephone.

or television media in North Dakota, nor does it advertise in newspapers distributed in North Dakota or on billboards located in the state. (J.A. 32.) Quill does not solicit by means of telegraphy, cable, optic, microwave, or similar communication system located in North Dakota. (J.A. 32.)

Proceedings Below.

North Dakota filed this action on July 7, 1989 and requested that the court: (i) declare Quill a "retailer maintaining a place of business in [North Dakota]"; (ii) "require Quill to obtain a North Dakota sales and use tax permit"; and (iii) order Quill to pay all North Dakota use taxes (plus interest and penalties) due from July 1, 1987. (J.A. 5-6.) Quill defended against this action on the grounds that it violated the due process and commerce clauses of the U.S. Constitution as established by this Court's decision in *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967). Quill also sought reimbursement of attorneys' fees and costs pursuant to 42 U.S.C. §§ 1983 and 1988.

On cross-motions for summary judgment, the district court held for Quill. (Pet. App. A38.) The court declared that the 1987 amendments to the North Dakota Tax Law, Sections 57-40.2-01(6) and (7), violated the due process and commerce clauses of the United States Constitution and declared those amendments invalid as applied to Quill. (Pet. App. A42.) The district court found that Quill's contacts with North Dakota were factually indistinguishable from the contacts of the mail order company addressed by this Court in *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967). (Pet. App. A40.) The district judge specifically emphasized that the state failed to present any facts that demonstrated that Quill benefited from protection of the local government. (Pet. App. A41.) Without analysis, the court denied Quill's re-

quest for reimbursement of attorneys' fees and costs pursuant to 42 U.S.C. §§ 1983 and 1988. (Pet. App. A42.)

The state appealed to the North Dakota Supreme Court which reversed.[5] The supreme court refused to follow the constitutional standards established in *Bellas Hess*. It concluded that those standards were "obsolescent precedent." (*Quill*, Pet. App. A10.) The court also concluded that the existence of an organized market for Quill's products in North Dakota satisfied the nexus considerations in this case. (*Quill*, Pet. App. A8, A25.) The North Dakota Supreme Court held Quill liable for North Dakota use taxes on sales made by Quill into North Dakota commencing July 1, 1987. (Pet. App. A36, A37.) Request for this Court's review followed.

SUMMARY OF THE ARGUMENT

The great purpose of the commerce clause is to promote and protect an area of free trade among the states. A key element of the protection given to the national economy by the commerce clause is the prohibition of state taxation on activities insufficiently related to the state. The decisions of this Court under the commerce and due process clauses have established and repeatedly recognized that a state cannot impose tax obligations on an out-of-state vendor unless the vendor has a "substantial nexus" with the taxing jurisdiction. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977); *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753, 756, 758 (1967).

[5] Quill cross-appealed that portion of the final judgment whereby the district court dismissed Quill's counterclaim for reimbursement of attorneys' fees and other costs under 42 U.S.C. §§ 1983 and 1988.

When determining whether there is sufficient "nexus" to require an out-of-state vendor to collect state taxes, this Court has weighed the resulting burden on the vendor against the extent of the vendor's contacts, if any, with the taxing state. The controlling question has been whether the tax obligations sought to be imposed have a proper relation to the benefits of local government conferred upon the out-of-state vendor by the taxing state. (*Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940); *Complete Auto Transit*, 430 U.S. 274.) To require out-of-state vendors, who do no more than communicate with customers by mail or common carrier, to collect sales and use taxes owed by customers in numerous states would subject those vendors to fundamentally unfair burdens obstructing interstate commerce. *Bellas Hess*, 386 U.S. 753 (1967).

For nearly twenty-five years, this Court's leading decision defining nexus required in the context of collecting state use taxes on interstate mail order sales has been *Bellas Hess*. There, this Court ruled that states could not impose use tax collection and payment obligations on out-of-state mail order vendors who maintained no physical presence within the taxing state. 386 U.S. at 758. This Court found the requirement of physical presence to rest upon principles essential to the overriding national policy of preserving open interstate markets. 386 U.S. at 759-60. The Court reasoned that without a clear workable standard, companies such as mail order vendors would be subject to state tax obligations based on an uncertain standard of whether the mail order company "regularly and continuously engaged in the 'exploitation of the consumer market' " in the state. 386 U.S. at 762 (Fortas, J., dissenting). Without a clear standard, out-of-state vendors who owned no property and conducted no local activities in the taxing state, would be subject to a "virtual welter of complicated obligations to local jurisdictions" which

would impose unjustifiable local burdens on interstate commerce. 386 U.S. at 759-60.

Bellas Hess followed a line of decisions that for over twenty-five years required physical presence within a state before tax obligations could be imposed. This principle, followed in *Bellas Hess* and its progeny, has been imbedded in business and state tax administrative practices and has been a workable standard for twenty-five years.

In 1987 North Dakota urged Congress to enact federal legislation to permit North Dakota and other states to impose sales and use taxes on mail order sales in certain situations. (Pet. App. A58.) Simultaneous with its petition to Congress, North Dakota enacted state legislation that would enable it to collect taxes if permitted by Congress. (Pet. App. A47, A56, A60.) Congress considered but never enacted federal legislation to authorize the states to tax out-of-state vendors who did not conduct a local business or maintain property in the taxing state. The strong congressional reluctance to expand the states' taxing powers was and continues to be based on the conflict between: (i) the constitutional need to eliminate cumulative, substantial and discriminatory burdens on the interstate business of out-of-state mail order vendors, and (ii) the state and local governments' inability to get together to eliminate those burdens.

The statute and regulations enacted by North Dakota in 1987 require every out-of-state vendor who mails three or more advertisements into North Dakota during a twelve-month period to register as a "*retailer maintaining a place of business*" in North Dakota and be subject to all provisions of North Dakota law applicable to local vendors operating local establishments within the state. The North Dakota statute ignores *Bellas Hess* and the constitutional principle that a state may not impose tax burdens on an out-of-state business unless that business has

a local presence in the state to justify sharing the costs of government.

The North Dakota Supreme Court upheld the constitutionality of the North Dakota use tax law as applied to *Quill*, even though the lower court concluded that Quill did not meet the *Bellas Hess* "physical presence" test. (Pet. App. A40.) The Supreme Court explicitly based its decision on its conclusion that *Bellas Hess* is "obsolescent precedent." (Pet. App. A10.) The court opined that "the foundational basis of *Bellas Hess* has been eroded and that the Supreme Court would so conclude." (Pet. App. A13.)

The North Dakota Supreme Court cited no decision of this Court questioning the continued validity of *Bellas Hess*. Instead, the court followed Justice Fortas' dissenting opinion in *Bellas Hess*, labeling it the "ubiquitous presence" test. (Pet. App. A8, A29.) The court advanced no new analysis to justify its refusal to follow this Court's precedent. The facts relied upon by the court below do not bear upon the constitutional protections afforded by the commerce and due process clauses. The North Dakota Supreme Court ignores fifty years of jurisprudence and misapplies this Court's holding in *Complete Auto Transit*. The court also ignores the tremendous burdens that will be imposed upon mail order vendors if the "business presence" standard is abandoned for an amorphous "ubiquitous presence" test.

Adoption of North Dakota's test on a nationwide basis will expose all mail order vendors to economic chaos, especially if states are allowed retroactively to apply this new standard to vendors who cannot collect use taxes on prior sales. This Court should not countenance the weakening of constitutional protections of interstate commerce. Reliance upon the existing standard set forth in *Bellas Hess* has afforded a workable rule for more than twenty-five years. Any realignment of commerce clause applications is more suitably undertaken by Congress.

ARGUMENT

I. THE NORTH DAKOTA SUPREME COURT ERRONEOUSLY REFUSED TO APPLY *BELLAS HESS* IN A CASE THAT IS FACTUALLY INDISTINGUISHABLE.

This case presents the question whether the North Dakota Supreme Court was justified in refusing to apply the "physical presence" standard articulated in *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967).

A. The Fundamental Purpose of the Commerce Clause is to Promote and Protect an Area of Free Trade.

A primary effect of the commerce and due process clauses has been to secure a unified, national market unimpeded by state-imposed burdens and restraints against trade across state lines. It has long been recognized by this Court that the fundamental purpose of the commerce clause was to promote and protect an area of free trade among the several states. In *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977), this Court said:

> As in *Great A&P Tea Co. v. Cottrell*, 424 U.S. 366 (1976), we begin with the principle that "[t]he very purpose of the Commerce Clause was to create an area of free trade among the several States." *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944). It is now established beyond dispute that "the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade free from interference by the States.

Boston Stock Exchange, 429 U.S. at 328.

In *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266 (1987), this Court described free interstate trade as the "central" purpose of the commerce clause. 483 U.S.

at 280. Of all of this Court's statements regarding the commerce clause, Justice Jackson's is perhaps the most eloquent. In *H.P. Hood & Sons v. Dumond*, 336 U.S. 525 (1949), he stated:

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

Hood & Sons, 336 U.S. at 539.

A key element of the protection given to the national economy by the commerce clause is the prohibition of state tax on activities insufficiently related to the taxing state. The decisions of this Court under the due process and commerce clauses have established and repeatedly recognized that a state cannot impose tax obligations on an out-of-state vendor unless the vendor has a "substantial nexus" with that taxing state. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). In *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 626 (1981), this Court explained:

> [I]nterstate business must have a substantial nexus with the State before *any* tax may be levied on it. See *National Bellas Hess, Inc. v. Illinois Revenue Dept.*, 386 U.S. 753 (1967).

Quoting *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938), the Court also stated:

> [t]he measure of tax must be reasonably related to the extent of the contact, *since it is the activities or presence of the taxpayer in the State* that may prop-

> erly be made to bear a "just share of state tax burden."

Commonwealth Edison Co. v. Montana, 453 U.S. at 626 (Emphasis added).

For nearly a quarter of a century, this Court's leading decision defining the required nexus in the context of mail order sales has been *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967). There, this Court ruled that states could not impose use tax collection and payment obligations on out-of-state mail order vendors that maintained no physical presence within the taxing state:

> In order to uphold the power of Illinois to impose use tax burdens on National [Bellas Hess] in this case, we would have to repudiate totally the sharp distinction which these and other decisions have drawn between mail order sellers with retail outlets, solicitors, or property within a State, and those who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business. But this basic distinction, which until now has been generally recognized by the state taxing authorities, is a valid one, and we decline to obliterate it.

Bellas Hess, 386 U.S. at 758.

The court found the requirement of physical presence to rest upon principles essential to the overriding national policy of preserving open interstate markets. The Court reasoned that, without this distinction, companies such as mail order sellers would be subject to a "virtual welter of complicated obligations to local jurisdictions" which would impose "unjustifiable local entanglements" on interstate commerce. *Bellas Hess*, 386 U.S. at 759-60.

Recently, in *Dennis v. Higgins*, 111 S. Ct. 865 (1991), this Court recognized that the right of merchants to engage in interstate trade free of such "local entanglements"

is a "right" and "privilege" secured by the Constitution. The Court said:

> The Court has often described the Commerce Clause as conferring a "right" to engage in interstate trade free from restrictive state regulation. In *Crutcher v. Kentucky*, 141 U.S. 47 (1891), in which the Court struck down a license requirement imposed on certain out-of-state companies, the Court stated: "To carry on interstate commerce is not a franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States." Id., at 57. Similarly, *Western Union Telegraph Co. v. Kansas ex rel. Coleman*, 216 U.S. 1, 25 (1910), referred to "the substantial rights of those engaged in interstate commerce." And *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967), declared that engaging in interstate commerce is a "righ[t] of constitutional stature."

Dennis v. Higgins, 111 S. Ct. at 871 (1991).

It is the right to market its goods in the fifty states which Quill defends in this case.

Marketing consists initially of making the market aware of a merchant's products. In this case, marketing involves the use of catalogs directed to customers by the U.S. mail. North Dakota urges this Court to concede that *any* method regularly used to advertise and market goods to citizens within a state supports a finding of nexus, subjecting the out-of-state vendor to a host of tax and regulatory provisions under state law. (*Quill*, Pet. App. A29.) North Dakota would extend its tax laws to:

> every person who engages in regular or systematic solicitation of a consumer market in this state by the distribution of catalogs, periodicals, advertising flyers, or other advertising, or by means of print, radio or television media, by mail, telegraphy, telephone, computer data base, cable optic, microwave, or other communication system.

Section 57-40.2-01(6), N.D. Cent. Code (Supp. 1989). *See also* Section 57-40.2-01(7), N.D. Cent. Code (Supp. 1989) (Pet. App. A47-A48.)

B. North Dakota's Holding is Contrary to Fifty Years of Jurisprudence Interpreting the Commerce and Due Process Clauses.

The consequences of North Dakota's argument are dramatic. It eviscerates both the first and fourth prongs of the *Complete Auto Transit* test (*Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977), discussed *infra*, pp. 29-30). It also overturns the precedents of this Court established during the last fifty years, precedents which mandate a physical presence to support a finding of tax nexus. *See infra* pp. 27-32.

Local marketing activities conducted by vendors with a physical presence (retail outlets and sales personnel) in a state, clearly invoke the taxing power exercised by that state because that physical presence within the state "bears fiscal relationship to protection, opportunities and benefits given by the state" to those vendors. *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940). Out-of-state vendors who merely send advertising into interstate markets, whose sole connection with the state is through common carrier and United States mail, do not bear a similar relationship with the state or derive the same benefits as do local retailers with a physical presence in the state. As noted by this Court, "it is difficult to conceive of commercial transactions more exclusively interstate in character" than mail order transactions that justify protection from state tax obligations. *Bellas Hess*, 386 U.S. at 759-60; *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 347 (1954).

Jurisdiction to Tax Requires Physical Presence in the Taxing State

In each of the tax decisions culminating with *Bellas Hess*, tax nexus was found to exist only when physical presence in the taxing jurisdiction was established. These decisions have consistently identified the significant difference between vendors which maintain outlets, property, salesmen or representatives within a state and out-of-state vendors whose communications and contacts with customers are limited to mail, telephone and common carrier conducted in an interstate business.

In 1941 this Court required the mail order operations of Sears, Roebuck & Co. to collect use tax on sales to local customers because Sears maintained local retail stores conducting a related business in the taxing state. Stressing the importance of the local retail outlets which enjoyed the protection and services of the taxing state, this Court said:

> Since Iowa has extended to it that privilege, Iowa can exact this burden [of collecting the use tax] as a price of enjoying the full benefits flowing from its Iowa business.

Nelson v. Sears, 312 U.S. 359, 364 (1941) (Bracketed material added).

The Court then contrasted the benefits given retailers with a physical presence to those who have none:

> But those other concerns [exclusively out-of-state mail order vendors] are not doing business in the state as foreign corporations. Hence, unlike respondent [Sears] they are not receiving benefits from Iowa for which it has the power to exact a price.

Nelson v. Sears, 312 U.S. at 365 (Bracketed material added.)[6]

[6] This Court has never modified this basic principle that jurisdiction to tax requires some presence—in person or through tangi-

(Footnote continued on following page)

In 1954 this Court specifically rejected Maryland's effort to predicate jurisdiction to compel an out-of-state vendor to collect local use tax upon a finding of regular, continuous advertising, when the vendor maintained no local stores or local solicitors within the state. Miller Brothers maintained a Delaware furniture store and advertised its merchandise almost daily in newspapers and over radio stations which consistently reached Maryland customers. *Miller Bros.*, 347 U.S. at 349 (1954). Miller Brothers also mailed advertising flyers to Maryland customers four times a year, regularly sold furniture to Maryland customers for use in Maryland and made regular deliveries into Maryland using its own trucks driven by its own employees. This Court held that in the absence of a physical presence in Maryland, Miller Brothers could not constitutionally be required to collect the Maryland use tax on its sales. The *Miller Bros.* decision gave effect to the Court's earlier statement in *Sears* that out-of-state mail order vendors could not be required to collect state use taxes when the

[6] *continued*
ble property or representatives—within the taxing state. In *General Trading Co. v. State Tax Com.*, 322 U.S. 335 (1944) and *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960), the Court sustained imposition of tax liability where sales were solicited by employees and by independent contractors within the taxing state. In these cases, the Court emphasized the importance of the "local function of solicitation" and upheld the tax obligation because of the physical presence of sales representatives carrying on the vendor's business within the state. *Scripto*, 362 U.S. at 211. *See also Nelson v. Montgomery Ward & Co.*, 312 U.S. 373, 375 (1941) (local retail outlets located in state); *General Trading Co. v. State Tax Com.*, 322 U.S. 335, 337 (1944) (local agents located in state); *Standard Pressed Steel Co. v. Washington*, 419 U.S. 560, 561-62 (1975) and *Tyler Pipe Industries, Inc. v. Washington*, 483 U.S. 232, 249 (1987) (employees and representatives located in state); *National Geographic Society v. California*, 430 U.S. 551, 556 (1977) (offices and employees located in state); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 276 (1977); and *Good's Furniture House, Inc. v. Iowa State Board of Tax*, 382 N.W.2d 145, 146-47 (Iowa), *cert. denied*, 479 U.S. 817 (1986) (in both cases trucks and employees located in state).

vendors had neither outlets nor solicitors within the taxing state, even though the vendors regularly solicited orders through the interstate dissemination of general advertising.

Bellas Hess

Thirteen years later in *Bellas Hess*, this Court reviewed Illinois' effort to avoid the nexus standard applied in *Miller Bros.* Illinois argued that it could require use tax collection by an out-of-state vendor whose contacts with Illinois consisted primarily of the regular and systematic mailing of catalogs and advertising flyers to Illinois residents and the regular delivery of ordered goods via mail or common carrier. It failed. *Bellas Hess*, 386 U.S. at 754-55, 758. Bellas Hess owned no tangible property, real or personal, in Illinois. It did, however, conduct a sizeable mail order operation (approximately $60 million in total annual sales) with a significant level of both sales and advertising in Illinois.[7] Considering whether the activities of Bellas Hess were sufficient to support Illinois' claims of nexus (to support imposition of tax collection duties), this Court again analyzed the applicable commerce and

[7] Bellas Hess sold approximately $2.1 million of merchandise into Illinois over a 15-month period, mailed semi-annual catalogs listing over 4,000 products to over 5 million customers, and sent advertising flyers to an even larger list of customers. *Bellas Hess*, 386 U.S. at 761. (Fortas, J., dissenting.) Bellas Hess sold a substantial part of its merchandise on credit payment plans, accepted checks drawn on Illinois banks, and sold goods C.O.D. *Id.* The company provided merchandise guarantees to its customers, allowing returns, exchanges or refunds. It solicited names of potential new customers from existing customers and accepted orders by telephone. *Bellas Hess*, 386 U.S. at 761 n.2; Affidavit of Thomas J. Curry, J.A. 49-50. *See* National Bellas Hess 1967 Catalog, Spring and Summer ed., *Bellas Hess*, Record on Appeal (O.T. 1966, No. 241); National Bellas Hess Spring 1970 catalog, reproduced in the *Quill* Record on Appeal Ex. I-2 (separately bound).

due process clause considerations.[8] It again concluded that when a vendor's only contacts with a state are by mail and common carrier, the state has no basis to require the vendor to collect use tax on mail order sales made to that state's residents and Illinois' efforts violated both the due process clause of the fourteenth amendment and the commerce clause.

In *Bellas Hess*, this Court applied an established and ascertainable tax nexus test that keyed on whether a vendor maintains a physical presence (retail outlets, solicitors or property) within the taxing state. The Court reviewed over twenty-five years of jurisprudence and observed:

> But the Court has *never* held that a State may impose the duty of use tax collection and payment upon a seller whose only connection with customers in the State is by common carrier or the United States mail.

Bellas Hess, 386 U.S. at 758. (Emphasis added.)

The Court considered and rejected Illinois' argument that maintenance of an economic marketplace justified the imposition of tax collection obligations. Justice Fortas' dissenting opinion, considered by the North Dakota court as prescient (*Quill*, Pet. App. A8), urged this Court to abolish the "physical presence" test. (386 U.S. at 762.) Justice Fortas was persuaded that the political structure inherent in the marketplace, when combined with successful marketing, created an obligation upon a vendor to collect tax without regard to its physical presence in the political (taxing) jurisdiction. This same argument has now been adopted and labeled by the North Dakota court as its "ubiquitous presence" test. (*Quill*, Pet. App. A29.)

[8] Tax nexus criteria under the due process and commerce clauses are similar. *Bellas Hess*, 386 U.S. at 756; *Trinova Corp. v. Mich. Dept. of Treasury*, 111 S. Ct. 818, 828-29 (1991). Due process requires that there be "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax," *Bellas Hess*, 386 U.S. at 756, and the commerce clause requires that the tax "[be] applied to an activity with a substantial nexus with the taxing State, . . . not discriminate against interstate commerce, and [be] fairly related to the services provided by the State." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

In reviewing the expansive application of the Illinois law advocated by the state in *Bellas Hess*, this Court recognized that the statute would impose tax collection liabilities on all regular advertisers without regard to the magnitude of their sales activity. The argument advanced by Illinois counsel (but rejected by this Court) in *Bellas Hess* demonstrates that the test Illinois sought to impose was the same test articulated in Justice Fortas' dissenting opinion and is the same test that the North Dakota court here labels as the "ubiquitous presence" test:

> [T]he rule that I would suggest should be distilled from the cases of this Court is a rule which businessmen should well understand, and that is simply when a business is successfully in a state from a business point of view that that should be equated with presence from a legal point of view.

Transcript of Oral Argument, p. 33, *Bellas Hess v. Department of Revenue*, 386 U.S. 753 (1967) (O.T. 1966 No. 241), reproduced in Appendix 1 to Petitioner's Brief.

The standard espoused by Illinois and subsequently embraced by Justice Fortas and the North Dakota Supreme Court is not functional and in reality provides no test at all. It renders nugatory the commerce clause and due process protections heretofore established by this Court and would reverse the decision of this Court in *Bellas Hess*.

Quill is Factually Indistinguishable from Bellas Hess

Quill and *Bellas Hess* have a unique likeness on the level of sales,[9] on the level of advertising flyers,[10] and on commercial law applications.[11] The North Dakota District Court Judge found that Quill's relationship to North Dakota was "very similar" to the relationship of Bellas Hess to Illinois. (Pet. App. A40.)

North Dakota's "Ubiquitous Presence" Test

The North Dakota Supreme Court also acknowledged that *Bellas Hess* was directly on point. (*Quill*, Pet. App. A5.) However, its finding of jurisdiction to tax Quill rested upon its determination that application of the commerce and due process clauses now allows a "ubiquitous presence" analysis (rather than a "physical presence" analysis) when ascertaining taxable nexus. The court below argued

[9] In fact, more sales were at issue in *Bellas Hess* than in *Quill*. Bellas Hess' sales to Illinois residents in the *fifteen-month period* at issue in that case totalled $2,174,744. *Bellas Hess*, 386 U.S. at 761 (Fortas, J., dissenting). Quill's sales to North Dakota residents in the *twenty-four month period* involved in this litigation totalled $1,849,305. (R. 92.) Thus Quill's annual sales were approximately half of Bellas Hess' annual sales. To allow for inflation, if Bellas Hess' annual 1961 Illinois sales are converted to 1989 dollars (using the Consumer Price Index), Bellas Hess would have sold approximately $9 million into Illinois, more than nine times the amount of Quill's annual sales into North Dakota. (R. 282-283.)

[10] More advertising flyers were mailed by Bellas Hess into Illinois than Quill mailed into North Dakota. Bellas Hess mailed to its customers over 5 million semi-annual catalogs listing over 4,000 products. Bellas Hess also mailed a substantially larger number of advertising flyers to customers. If Bellas Hess catalogs were distributed on the same ratio as its sales, the company would have mailed in excess of 289,000 catalogs to Illinois customers annually, not counting advertising flyers mailed separately and catalogs included with customer orders. (Compare R. 281 with R. 95.)

[11] Bellas Hess offered "charge account" services, shipped merchandise C.O.D. and sold merchandise with guarantees of customer satisfaction. *Bellas Hess*, 386 U.S. at 761. (J.A. 49.)

that "the foundational basis of *Bellas Hess* had been eroded" (*Quill*, Pet. App. A13); it then adopted as the basis for its opinion a "ubiquitous presence" test, incorporating the test articulated by Justice Fortas in his dissent in the *Bellas Hess* case. The court below stated:

> We conclude that Quill's asserted lack of physical presence is not fatal to the State's attempt to require Quill to collect and remit use tax on its sales into North Dakota . . . [W]e conclude that the concept of nexus encompasses more than mere physical presence within the state . . .

(*Quill*, Pet. App. A25.)

More precisely stated, the court concludes that the concept of nexus encompasses *less* than "physical presence." In support, the court enlists reference to the "tremendous social, economic, commercial and legal innovations" that have occurred during the intervening years since 1967. (*Quill*, Pet. App. A8, A10.) However, the North Dakota Supreme Court fails to explain how these "tremendous" innovations impact upon this Court's constitutional analysis in *Bellas Hess*. The court below looks at the same "benefits" considered by this Court in 1967, but in the context of communication technology in the 1990s. The court recites Quill's activities in a context that demonstrates a more efficient marketplace exists today than in 1967, but the court fails to identify how that efficiency obligates Quill to collect North Dakota use taxes:

> Quill's activities directed toward North Dakota consumers clearly establish a substantial [ubiquitous] "presence" within the State. To iterate Quill's activities, it has 3,500 active customers in North Dakota, and its annual sales of nearly $1,000,000 make it the sixth largest seller of office supplies in the State. It annually mails over 60 different catalogs and flyers to its North Dakota customers, accounting for 230,000 separate pieces of mail. Quill also has a "help line" for consumers to call if they have questions or prob-

> lems with merchandise ordered from Quill, and specialized service representatives are available [in Illinois] to assist with custom printing orders or to answer questions about computers available from Quill. Quill has availed itself of modern technology to engage in an extensive, continuous, and intentional solicitation and exploitation of the State's consumer market and had thereby established an *ubiquitous presence* in the State.

(*Quill*, Pet. App. A29); compare with *Bellas Hess*, 386 U.S. at 760-63. (Emphasis and bracketed material added.)

The dispute is not with Quill's activities, but with the court's substitution of a "ubiquitous presence" test[12] for this Court's "physical presence" test. Use of the "ubiquitous presence" test to establish tax nexus is both unsupportable and inapposite under constitutional precedent interpreting commerce and due process clause protections afforded out-of-state firms conducting a general interstate business. The 1987 amendments to the North Dakota tax law and the North Dakota Supreme Court's "ubiquitous presence" test impose North Dakota tax liability upon any vendor or advertiser making more than three solicitations per year, without regard to the magnitude of the market or the amount of merchandise sold.

The arguments urged by the North Dakota Supreme Court were considered and rejected by this Court in *Bellas Hess*, 386 U.S. at 760-762 (Fortas, J., dissenting). This Court reviewed the factual predicates needed for tax nexus and unequivocally rejected Justice Fortas' argument that

[12] Presumably the court was referring to the commonly understood meaning of the term "ubiquitous," that is "existing or being everywhere at the same time." Webster's Third New International Dictionary, Unabridged (1981), Merriam-Webster. Black's Law Dictionary defines the term "ubiquity" in a similar manner: "omnipresence; presence in several places, or in all places, at one time." Black's Law Dictionary (6th ed. 1990).

economic benefits derived through "systematic, continuous solicitation and exploitation" of a state's market (i.e., a "ubiquitous" presence without physical presence) satisfied the constitutional requirements for tax nexus. *Bellas Hess*, 386 U.S. at 758.

North Dakota provides no new insights to justify adoption of this amorphous "ubiquitous presence" test previously repudiated in *Bellas Hess*. The North Dakota Court merely refocuses the arguments rejected in *Bellas Hess* by pointing to: (i) the increased size of the industry (which the North Dakota court found to be "the greatest change in mail order since 1967") (*Quill*, Pet. App. A12); (ii) the new technology for ordering goods including "toll-free telephone lines, fax orders, and direct computer ordering" and the new methods for delivering merchandise, including "advances in the parcel delivery industry . . . including overnight delivery" (*Quill*, Pet. App. A12); and (iii) the service of North Dakota in disposing of the "solid waste" created by catalogs sent to North Dakota residents. (*Quill*, Pet. App. A34.)

The Size of the Mail Order Industry is not Constitutionally Significant

The court below observes that during the quarter-century which has passed since *Bellas Hess*, " 'mail order' has grown from a relatively inconsequential market niche into a goliath."[13] (*Quill*, Pet. App. A11.) The court makes no effort to, nor can it, explain how the volume of sales of the mail order industry has any relevance to whether

[13] Contrary to the speculations of the court below, this Court was fully aware that the sizable number of mail order sales at issue in *Bellas Hess* in 1967 would increase in the coming years (*Bellas Hess*, 386 U.S. at 764), but the potential magnitude of that future growth did not impact this Court's constitutional analysis.

Quill has nexus to North Dakota.[14] Neither the size of the market nor the percentage of market penetration is of constitutional significance. It is the physical nexus of the vendor to the market state which determine tax burdens. 386 U.S. at 758. If the North Dakota ruling is affirmed, every company whose activities are limited to solicitation, without actual physical presence, will lose the constitutional protections heretofore afforded, regardless of their size.

In sum, the North Dakota court has in this case decided that any successful mail order vendor will be required to collect a tax for North Dakota without regard to any other activity occurring in the state, other than the fact that there has been solicitation and sales. This holding has given an entirely new, unprecedented and unsupported meaning to both the commerce and due process clauses of the Constitution.

New Technology Does Not Support Abandonment of Accepted Constitutional Criteria

Without meaningful analysis the North Dakota Supreme Court also urges that technological advances in communications in the last two decades support the abandonment of accepted constitutional criteria. The economic market

[14] The North Dakota court's emphasis on the "sheer volume" of mail order sales ignores the fact that *Bellas Hess* sold nearly twice as much merchandise into Illinois than Quill sold into North Dakota. See note 9 *supra*. The court also ignores the fact that more than 94% of mail order firms have annual sales of less than $12.5 million. *Collection of State Sales and Use Taxes by Out-of-State Vendors: Hearing on S.639 and S.1099 for the Subcomm. on Taxation and Debt Mgmt. of the Senate Comm. on Finance*, 100th Cong., 1st Sess. (1987), 15-16 (testimony of Governor George Sinner of North Dakota). Direct Marketing Association, the largest trade association representing mail order businesses, reports that 85% of its 3500 members have annual national sales of less than $10 million; 62% report annual sales of less than $3 million. (Brief of Amicus Curiae Direct Marketing Association at 1.)

(the existing national marketplace) is obviously larger in 1991 than it was in 1967. There have been and will continue to be significant improvements in communication capabilities among the vendors and vendees who comprise the marketplace. But draftsmen of the constitution had the foresight to appreciate that those markets should remain accessible and unencumbered in order to foster the economic well-being of all citizens, regardless of the technology used. The maintenance of a geographical market (e.g., North Dakota residents) has never been perceived as a governmental service sufficient to justify the imposition of a tax. *H.P. Hood & Sons v. Dumond*, 336 U.S. 525, 539 (1949); *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753, 759-60 (1967); *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 328 (1977).

In the mail order business, markets exist wherever residents reside. Given the nature of our inherent political structure, residents reside in a state. Given the need to finance state governments, states levy taxes on residents and on non-residents who have some connection ("physical presence/nexus") with the state. But non-residents are otherwise protected from taxation by the many states under both the commerce and due process clauses to the constitution unless they physically enter the taxing jurisdiction. *Bellas Hess*, 386 U.S. at 758 (1967); *Miller Bros.*, 347 U.S. at 347 (1954); *Sears*, 312 U.S. at 364 (1941). This Court has never held that constitutional protections historically afforded are dependent upon the efficiencies of the vendor.[15]

The statute that the North Dakota court upheld permits North Dakota to tax any mail order vendor without regard to whether the vendor takes advantage of the technological advances of the past thirty years. North Dakota would deny the commerce clause and due process protec-

[15] *See, e.g., Hunt v. Washington*, 432 U.S. 333, 351 (1977).

tions to all vendors who market in that state by mail or common carrier. The court's argument that telephonic and related communication improvements have rendered this Court's decision in *Bellas Hess* "obsolescent precedent" (*Quill*, Pet. App. A10) has overwhelming significance when considered in the context of existing and anticipated technological changes.

North Dakota's Reliance Upon Waste Disposal To Establish Tax Nexus Is Misplaced

The North Dakota Supreme Court also urges that Quill should be obligated to collect North Dakota use tax because (i) Quill mails catalogs into North Dakota, and (ii) catalogs ultimately may be disposed of in landfills located in North Dakota. (*Quill*, Pet. App. A34.) While the level of awareness of environmental concerns has increased, the argument of the court below precisely follows Illinois' attempt to establish nexus in *Bellas Hess*. In 1967 Illinois argued before this Court that Bellas Hess' "catalogs and advertising flyers . . . are found within the State" and, thus, support a finding of nexus with Illinois to require collection of Illinois use tax on merchandise sold to Illinois customers.[16] This Court rejected that argument, pointing out that mere "communicat[ion] with customers in the State by mail or common carrier as part of a general interstate business" does not establish the necessary physical presence for imposition of use tax collection obligations. *Bellas Hess*, 386 U.S. at 758. Catalogs sent by Bellas Hess into Illinois obviously ended up in Illinois landfills, but this Court did not find that fact to be constitutionally significant.[17] The North Dakota court fails to address the issue

[16] Brief for Appellee at 15-16, *Bellas Hess*, 386 U.S. 753 (O.T. 1966, No. 241).

[17] In fact, more catalogs and advertising flyers were mailed annually by Bellas Hess into Illinois than Quill mailed annually into North Dakota. *See* note 10, *supra*.

of how this fact now obtains greater significance in the context of North Dakota. The argument of the North Dakota court adds nothing new to the issue previously considered by this Court in *Bellas Hess*.[18]

The Law Has Not Changed; This Court Has Consistently Applied the Holding in Bellas Hess

In *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959), Justice Clark reviewed this Court's prior decisions regarding unconstitutional state taxes. While conceding that those decisions were sometimes confusing and inconsistent he stated: "From the quagmire there emerge, however, some firm peaks of decision which remain unquestioned." 358 U.S. at 458. For the last quarter century, this Court's decision in *Bellas Hess* has been one of those "firm peaks of decision".[19]

This Court has consistently applied *Bellas Hess* and has never held that communicating with customers by mail or telephone is sufficient to provide tax nexus. Contrary to the North Dakota Supreme Court's suggestion (*Quill*, Pet. App. A15-A16), this Court did not abandon the nexus standard set forth in *Bellas Hess* when deciding *National Geographic Society v. California Bd. of Equalization*, 430 U.S. 551 (1977). In *National Geographic*, the vendor maintained two offices and up to eight employees in California to solicit advertising for its magazine. *National Geo-*

[18] *See also SFA Folio Collections, Inc. v. Bannon*, 585 A.2d 666, 671 (1991), *cert. denied*, 111 S. Ct. 2839 (1991); and *Wisconsin v. J.C. Penney*, 323 N.W.2d 168, 170 (Wisc. App. 1982); *Mart Realty, Inc. v. Norberg*, 303 A.2d 361, 363 (RI 1973); *Hoffman-LaRoche, Inc. v. Porterfield*, 243 N.E.2d 72, 75 (Ohio 1968) (all holding that advertising material, once mailed, becomes the property of the recipient).

[19] *Bellas Hess* has been cited by this Court and by lower state and federal courts in approximately 75 cases decided over the last quarter-century. *See* Pet. App. A76 and Appendix 4.

graphic, 430 U.S. at 552, 555-56; 547 P.2d at 458, 459 (Cal. 1976). National Geographic also operated a mail order business from its facilities located in the District of Columbia and Maryland. California sought to require National Geographic to collect use tax from mail order sales of merchandise to California residents. The California Supreme Court agreed and stated:

> Where an out-of-state seller conducts a substantial mail order business with residents of a state . . . the *slightest presence* within such taxing state independent of any connection through interstate commerce will permit the state constitutionally to impose on the seller the duty of collecting the use tax from such mail order purchasers and the liability for failure to do so.

National Geographic, 430 U.S. at 555-56 quoting *National Geographic*, 547 P.2d 458, 462 (Cal. 1976) (Emphasis added by the Court).

While upholding California's claim, this Court specifically rejected California's "slightest presence" test, stating:

> [N]ot every out-of-state seller may constitutionally be made liable for payment of the use tax on merchandise sold to purchasers in the [taxing] State.

National Geographic, 430 U.S. at 555.

> Our affirmance of the California Supreme court is not to be understood as implying agreement with that court's "slightest presence" standard of Constitutional nexus . . . Our affirmance . . . rests upon our conclusion that appellant's maintenance of the two offices in California and activities there adequately establish a relationship or "nexus" between the Society and the State . . .

National Geographic, 430 U.S. at 556.

As in *Bellas Hess*, this Court focused on the physical presence of National Geographic in California, not the "economic benefits" derived from the state or the "slightest presence" theory advanced by the California court. *National Geographic*, 430 U.S. at 556-57. This is emphasized by the Court's reiteration in *National Geographic* of the holding in *Bellas Hess*:

> The Court's opinion [in *Bellas Hess*] carefully underscored, however, the 'sharp distinction . . . between mail order sellers with retail outlets, solicitors, or property within [the taxing] State and those like National [Bellas Hess] who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business. *Id.* at 758. *Appellant [National Geographic] Society clearly falls into the former category.*

National Geographic, 430 U.S. at 559 (emphasis added).

The North Dakota Supreme Court's contention that *Bellas Hess* was eroded by *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), is also wrong. (*Quill*, Pet. App. A13-A14.) The court correctly recognized that *Complete Auto* sets forth the relevant tests for analyzing whether a state's tax violates the commerce clause. The first prong of the *Complete Auto* test requires a finding of an "activity with a *substantial* nexus with the taxing State." *Complete Auto*, 430 U.S. at 279. Far from abandoning *Bellas Hess*, this Court's later decisions make it abundantly clear that *Bellas Hess* is not only entirely consistent with *Complete Auto*, but is the touchstone of the first prong of *Complete Auto*. As this Court stated in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981):

> Under this threshold test, the interstate business must have a substantial nexus with the State before *any* tax may be levied on it. See *National Bellas Hess, Inc. v. Illinois Revenue Dept.*, 386 U.S. 753 (1967).

Commonwealth Edison, 453 U.S. at 626 (emphasis in original).

Far from being rejected, the *Bellas Hess* decision was directly incorporated into the *Complete Auto* commerce clause test.[20] In fact, it is the North Dakota "ubiquitous presence" standard that is inconsistent with this Court's pronouncements in *National Geographic* and *Complete Auto*. Both of these cases require a "physical presence" to sustain a finding of "substantial nexus" with the taxing state, before tax liability may be imposed on the out-of-state business. In both *National Geographic* and *Complete Auto*, the "physical presence/substantial nexus" requirement was satisfied by officers, employees, substantial tangible personal property and localized business activities occurring within the taxing state. North Dakota's "ubiquitous presence" test thus ignores the first and fourth prongs of the *Complete Auto Transit* test by discarding the requirements that "the tax [be] applied to an activity with a substantial nexus with the taxing state" and that "[the tax be] fairly related to the services provided by the state." *Complete Auto*, 430 U.S. at 279. At the very least, under this Court's holdings the interstate business must have a physical presence with the taxing state before any tax may be levied on it. *Commonwealth Edison*, 453 U.S. at 626. North Dakota's "ubiquitous presence" test fails to incorporate this crucial element of physical presence and is constitutionally deficient under this Court's existing precedent.

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[20] This Court's decisions in *Tyler Pipe Industries, Inc. v. Washington Dept. of Revenue*, 483 U.S. 232 (1987) and *Standard Pressed Steel v. Washington Dept. of Revenue*, 419 U.S. 560 (1975), do not support the North Dakota Court's refusal to follow *Bellas Hess*. In both cases this Court focused on the substantial in-state activities of the taxpayers to uphold a finding of tax nexus. Standard Pressed Steel had one full-time employee and a group of other employees that regularly visited with the company's principal customer in Washington. 419 U.S. at 561. Tyler Pipe had independent sales representatives who acted daily on behalf of Tyler Pipe in calling on its customers and in soliciting orders in Washington. 483 U.S. at 249.

The continuing validity of *Bellas Hess* was again recognized by this Court in *Goldberg v. Sweet*, 488 U.S. 252 (1989). In *Goldberg*, this Court was called upon to decide whether an Illinois tax on interstate telecommunications violated the commerce clause. In deciding that issue, *Bellas Hess* was cited as relevant authority when this Court expressed doubts "that termination of an interstate telephone call, by itself" provided sufficient nexus for a state to tax that telephone call.[21] *Goldberg v. Sweet*, 488 U.S. at 263. This Court's statement in *Goldberg* is consistent with the holding in *Bellas Hess* that vendors who "do no more than communicate with customers" in the taxing state are constitutionally protected from use tax collection duties. *Bellas Hess*, 386 U.S. at 758.

In *D.H. Holmes Co. v. McNamara*, 486 U.S. 24 (1988), this Court implicitly reaffirmed its *Bellas Hess* holding. In *D.H. Holmes*, the Court addressed an attempt by Louisiana to impose use tax liability on D.H. Holmes, a Louisiana retailer, for catalogs it had printed out of state and shipped to Louisiana. D.H. Holmes maintained its principal place of business in New Orleans, operated 13 stores there and employed approximately 5,000 workers in Louisiana. 486 U.S. at 26-27. D.H. Holmes argued that it should be treated like the mail order company in *Bellas Hess*, "apparently view[ing] its catalog distribution as analogous to the mail order solicitation in *National Bellas Hess*." *D.H. Holmes*, 486 U.S. at 33. Chief Justice Rehnquist, in a unanimous decision, restated with approval this Court's holding in *Bellas Hess* and distinguished D.H. Holmes on the ground that the retailer was clearly physically present in Louisiana.

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[21] All parties in *Goldberg v. Sweet* conceded that the "substantial nexus" test of *Complete Auto* had been satisfied because each party owned property located in Illinois. 488 U.S. at 256 n.6, 258 n.9, 260.

The conclusion that *Bellas Hess* is not "obsolescent" law is demonstrated not only by this Court's own decisions, but also by the overwhelming number of lower federal and state courts that have acknowledged the continuing vitality and usefulness of the *Bellas Hess* "physical presence" standard.[22] Recognizing the fact that *Bellas Hess* controls the constitutionality of states' attempts to tax out-of-state mail order houses, courts have applied *Bellas Hess* to invalidate states' imposition of use tax collection obligations on businesses which lack a physical presence in the state. Two state supreme courts have invalidated their states' attempts to impose use tax collection duties on businesses that do not have a physical presence in the state (*SFA Folio Collections, Inc. v. Bannon*, 585 A.2d 666 (Conn.), *cert. denied* 111 S. Ct. 2839 (1991); *Cally Curtis Co. v. Groppo*, 572 A.2d 302 (Conn.), *cert. denied*, 111 S. Ct. 77 (1990); *Bloomingdale's By Mail Ltd. v. Dept. of Revenue*, 591 A.2d 1047 (Pa. 1991), *aff'g* 567 A.2d 773 (Pa. Commw. Ct. 1989) (per curiam) *cert. applied for sub nom Penn. v. Bloomingdale's By Mail Ltd.*, No. 91-383) and a federal district court invalidated California's attempt to impose use tax collection obligations on direct marketing companies with no physical presence in that state. *Direct Marketing Ass'n v. Bennett*, No. Civ. S-88-1067 (E.D. Cal. July 12, 1991) (1991 U.S. Dist. LEXIS 10736). *See also L.L. Bean, Inc. v. Commonwealth of Pennsylvania*, 516 A.2d 820 (Pa. Commw. Ct. 1986); *Book-of-the-Month Club, Inc. v. Porterfield*, 268 N.E.2d 272, 274 (Ohio 1971).

The "physical presence" standard articulated in *Bellas Hess* is the only appropriate test for application by lower courts reviewing the availability of commerce and due process protections to national marketers.[23] North Dakota's determination that this Court's decisions in this area have been made "obsolescent precedent" by the passage of time completely misses the mark and abandons a reliable standard under which businesses can predictably operate.[24]

[22] Federal and state cases citing *Bellas Hess* are listed at Pet. App. A76. Appendix 4 contains a partial listing and summary of these cases. *See also* Tribe, *American Constitutional Law* at 450, 460 (2d ed. 1988).

The Standards for Personal Jurisdiction and Tax Nexus Differ.

The North Dakota Supreme Court's reliance on *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), and other personal jurisdiction cases to establish tax nexus is misplaced. The North Dakota Supreme Court fails to note that this Court in *Bellas Hess* refused to adopt a tax standard fashioned from personal jurisdiction cases. In *Bellas Hess*, the State of Illinois urged this Court to adopt the "economic benefits" test that had already been applied in the personal jurisdiction cases for at least seventeen years. Appellee's Brief at 32-34, *National Bellas Hess* (O.T. 1966, No. 241). This Court declined to adopt that test to establish tax nexus and held in *Bellas Hess* that even continuous and systematic solicitation by mail would not create tax nexus as long as the taxpayer did not maintain a physical presence in the state. This Court has consistently distinguished between these two standards, tax nexus and personal jurisdiction. *See Travelers' Health Assoc. v. Virginia*, 339 U.S. 643, 653-54 (1950) (Douglas, J., concurring):

[23] The physical presence test as articulated in *Bellas Hess* is also consistent with this Court's decisions that prohibit states from requiring a foreign corporation to qualify to do business unless the corporation conducts intrastate, localized business activities. *See Allenberg Cotton Co. v. Pittman*, 419 U.S. 20, 33 (1974).

[24] The North Dakota Supreme Court has also failed to give the appropriate deference to this Court's decisions, which violates the doctrine of federal supremacy. *See* Quill's Petition for Writ of Certiorari at 17-22.

> It is the nature of the state's action that determines the kind or degree of activity in the state necessary for satisfying the requirements of due process.
>
> * * * * *
>
> The requirements of due process may demand more or less minimal contacts . . . depending on what the pinch of the decision is or what [a state] requires of the foreign corporation.

The North Dakota Supreme Court confuses the differing standards between personal jurisdiction and tax nexus, and restates an argument rejected by this Court in *Bellas Hess*. The North Dakota court improperly substitutes its "ubiquitous presence" test—a standard which is ultimately no greater than that imposed in the personal jurisdiction cases; a standard that this Court refused to apply to determine tax nexus when deciding *Bellas Hess*.

II. NATIONWIDE APPLICATION OF THE NORTH DAKOTA RULING RESULTS IN CUMULATIVE AND DISCRIMINATORY BURDENS ON OUT-OF-STATE MAIL ORDER VENDORS.

This Court has the benefit of careful congressional investigations of the impact of sales and use tax laws as applied to interstate commerce.[25] Congress is well aware

[25] Congress is fully aware of the *Bellas Hess* rule and over the years has considered legislation urged by the states to change that rule. Congress authorized hearings and studies to evaluate imposing state sales/use tax collection obligations on out-of-state vendors who did not maintain a physical presence within the taxing state. Legislation proposing a uniform federal response to state imposition of sales/use tax obligations has been introduced numerous times. Congress has declined to enact such legislation without state and local government agreement as to uniformity in application.

H.R.2230 ("Equity in Interstate Competition Act of 1989"), 101st Cong., 1st Sess. (1989); S.480 ("Equity in Interstate Competition Act of 1989"), 101st Cong., 1st Sess. (1989) (requiring uniform local

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of the claims of the state taxing authorities. It has studied and has attempted to resolve the various complex problems associated with the imposition of tax burdens on out-of-state vendors. In recent years numerous bills have been introduced to achieve at the federal level the goal that North Dakota seeks here.[26]

[25] *continued*

tax for application and setting minimum jurisdictional standards nationally ($12.5 million) and by state ($500,000)); S.2368, 100th Cong., 2nd Sess. (1988) (setting annual sales minimum for jurisdiction at $15 million nationally or $750,000 by state and providing variable local sales tax component); H.R.3521, 100th Cong., 1st Sess. (1987); H.R.1891, 100th Cong., 2nd Sess. (1987); H.R.1242, 100th Cong., 1st Sess. (1987) (establishing $5 million national annual sales minimum and requiring uniform local rate throughout the state); S.1099, 100th Cong., 1st Sess. (1987) (stating minimum jurisdictional standards including annual sales nationally of $12.5 million and providing local sales tax component); S.639, 100th Cong., 1st Sess. (1987). Hearings have also been held to evaluate a federal solution. *Interstate Sales Tax Collection Act of 1987 and the Equity in Interstate Competition Act of 1987: Hearings on H.R.1242, H.R.1891 and H.R.3521 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 100th Cong., 2d Sess. (1988) ["Hearings on H.R.1242, H.R. 1891 and H.R.3521"]; *Collection of State Sales and Use Taxes by Out-of-State Vendors: Hearings Before the Subcomm. on Taxation and Debt Management of the Senate Comm. on Finance to Consider S.639 and related S.1099, the Equity in Interstate Competition Act of 1987*, 100th Cong., 1st Sess. (1987) ["Hearings on S.639 and S.1099"].

[26] *See* note 25. Bills were introduced and considered in earlier years. *See* H.R.3549, 99th Cong., 1st Sess. (1985); S.1510, 99th Cong., 1st Sess. (1985); S.983, 96th Cong., 1st Sess. (1979); S.2173, 95th Cong., 1st Sess. (1977); S.2811, 93rd Cong., 1st Sess. (1973); S.2092, 93rd Cong., 1st Sess. (1973); S.282, 93rd Cong., 1st Sess. (1973); H.R.11798, 89th Cong., 1st Sess. (1965); introduced October 22, 1965 by Rep. Willis (ten companion bills with substantially similar text were also introduced by other representatives).

Hearings have been conducted on many of the bills: *See* note 25; *see also, Interstate Sales Tax Collection Act of 1987: Hearing on H.R. 1242 before the Subcomm. on Select Revenue Measures for the House Comm. on Ways and Means*, 100th Cong., 1st Sess. (1987) ["Hearing on H.R. 1242"]; *State Taxation of Interstate Commerce:*

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While there is debate about the form that such legislation should take, all of the proposals seek to address the substantial compliance burdens for out-of-state mail order vendors recognized by this Court in *Bellas Hess*, 386 U.S. at 753, 759-60.

The typical mail order vendor sends advertising into regional and national markets and receives orders from many jurisdictions. If North Dakota may require a mail order firm to collect taxes merely because it mails catalogs to customers who reside there, then so may every other state in which the vendor has customers. A nationwide application of the North Dakota law would require every mail-order vendor to register under the sales/use tax laws in every state in which it had customers, and incur liability to collect and pay over use taxes for thousands of counties, municipalities and school districts which impose sales/use taxes. For a mail order firm whose advertising runs nationwide, compliance means acting as a tax collector for each of the states and local subdivisions that impose sales and use taxes, approximately 6500 jurisdictions.[27]

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[26] *continued*
Hearing on S.1510 before the Subcomm. on Taxation and Debt Mgmt. of the Senate Comm. on Finance, 99th Cong., 1st Sess. (1985) ["Hearing on S.1510"]; *Interstate Taxation: Hearings on S.2173 before the Committee on the Judiciary*, 95th Cong., 1st and 2nd Sess. (1977 and 1978); *State Taxation of Interstate Commerce: Hearing on S.282, S.1245, S.2092 and H.R.2096 before the Subcomm. on State Taxation of Interstate Commerce of the Senate Comm. on Finance*, 93rd Cong., 1st Sess. (1973); *Interstate Taxation Act: Hearings on H.R.11798 and Companion Bills before the Special Subcomm. on State Taxation of Interstate Commerce of the Comm. on the Judiciary*, 89th Cong., 2nd Sess. (1966); *State Taxation of Interstate Commerce: Report of the Special Subcomm. on State Taxation of Interstate Commerce of the House Comm. on the Judiciary*, 89th Cong., 1st Sess., H. Rept. 565 (1965) ("Willis Report").

[27] When this Court considered *Bellas Hess*, it considered the burdens that would be caused by compliance with approximately

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In 1967, this Court found that this inevitable result imposed a serious burden on interstate commerce and due process. *Bellas Hess*, 386 U.S. at 759-760. If state laws were uniform and states would accept one set of records, the cumulative burden might be no more than proportionate to the volume of business. The difficulty results from the variations and inconsistencies in state laws and record-keeping requirements. In 1966 Congressman Willis, Chairman of the Special Subcommittee, described the plight of the typical out-of-state mail order vendor under a theory similar to that currently espoused by North Dakota:

> If it were to anticipate shipping its products into any State, city, county or hamlet from which it received an order, it would require a compilation of 80 volumes of State and local tax laws which reaches more than 22 feet in height when piled one on the other.[28]

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[27] *continued*
2300 tax jurisdictions. *Bellas Hess*, 386 U.S. at 759 n.12; Willis Report 841-845. Professor Archibald Cox set forth before this Court in explicit detail the disproportionate burdens which would be placed on interstate commerce if state and local governments were able to impose use tax collection burdens on out-of-state vendors who conducted a general interstate business. Brief for Appellant, App. B at 55-69 *Bellas Hess* (O.T. 1966, No. 241).

The compliance obligations, based on the number of taxing jurisdictions, have increased almost threefold with the passage of time. Advisory Commission on Intergovernmental Relations, *State and Local Taxation of Out-of-State Mail Order Sales* 6, 11 (April 1986) ["ACIR Report"]; and Note, *Collecting the Use Tax on Mail-Order Sales*, 79 Geo. L.J. 535, 539 (1991).

[28] 112 Cong. Rec. A-5055 (Sept. 30, 1966). Congressman Willis was addressing the insurmountable problems faced by the small business having to cope with the complex state and local tax requirements every time its products or its advertising materials are sent across state lines:

> [I]t is important to remember that the small businesses of our Nation are conducted by men who have already demonstrated their willingness to comply with reasonable and equitable tax laws. Our present system of taxing interstate commerce defies

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The Willis Report discloses—

> in all cases the charging and recording of sales tax is more complicated than in a retail store. One reason is, of course, the many States to which mail orders are sent from a single mail-order plant. [Report 771.]
>
> * * * * *
>
> The interstate seller of consumer goods . . . has the same costs as a local firm selling the same types of items *plus the added costs of complying with the laws of many States at once.*[29]

The cumulative burdens so obvious in the 1960's are even more onerous today.[30]

[28] *continued*
even their most conscientious efforts. Today, if a small company with less than 50 employees located in my State of Louisiana—or in Michigan, or in Maine, or in any one of the other States—were to invest not more than $100 a month for advertising in a trade journal which is given national distribution, it will expose itself to potential tax reporting requirements that are staggering. *Id.*

[29] Willis Report, p. 812 (emphasis added).

[30] *See Hearing on S.1510* at 80-82 (testimony of Alan Glazer on behalf of the Direct Marketing Ass'n); *Hearings on H.R. 1242, H.R. 1891* and *H.R. 3521* at 129-130 (testimony of Nat Standing of J.C. Penney Company stating that the administrative costs of compliance "are enormous"); Levering, *Federal Legislation*, 4 N.Y.U. Inst. on State and Local Taxation, ch. 8 at §8.03 (1986).

Federal legislation proposed in the wake of *Bellas Hess* would have allowed collection of local use taxes *only* if those taxes were uniform as to rate, base and administration by the state. *See* S.282, 93rd Cong., 1st Sess. (1973); S.2092, 93rd Cong., 1st Sess. (1973); and S.2173, 95th Cong., 1st Sess. (1977).

Current legislative proposals also seek uniformity and the elimination of the tremendous compliance burdens that would face out-of-state mail order vendors and their customers. These proposals would establish a uniform national rate of tax, an adequate collection allowance, uniform national definitions of exempt items, a uniform tax treatment of shipping and handling charges, and a single filing and audit procedure. *See, e.g.*, Committee on State Taxation of the Council of State Chambers of Commerce, *COST*

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A. Compliance Burdens Associated with Variances in Tax Laws.

The North Dakota Supreme Court trivializes the expense and administrative burdens which would result from requiring mail order companies to register and comply with the sales/use tax provisions for the 45 states and more then 6500 local taxing jurisdictions in the United States. These costs and problems are immense.[31]

Sales taxes in the various state and local jurisdictions vary considerably. Not only do the tax rates differ, but there is also great disparity in the designations of exempt items. *See* Brief of Amicus Curiae Coalition for Small Direct Marketers In Support of Petitioner, pp. 13-28.

[30] *continued*
Endorses Compromise on Bellas Hess Legislation, State Tax Report Nos. 253 at 1 (Sept. 26, 1990); 244 at 1 (Dec. 15, 1989). The reluctance of Congress to enact federal legislation without agreed uniformity among state and local taxing units highlights the numerous compliance problems facing out-of-state mail order vendors.

[31] The Advisory Commission on Intergovernmental Relations, a nonpartisan Congressionally-authorized body, has examined the issue of state and local taxation of mail order sales in the context of possible federal legislation. In its Executive Summary dated August 26, 1985, the ACIR recognized the significance of the compliance burdens on mail order companies:

> Heavy compliance burdens: The mail order firms could be forced to shoulder extraordinary compliance burdens if they are required to comply with the differing tax code provisions of 45 states and 7000 local governments that are now imposing sales taxes. (Page 2, Executive Summary, dated Aug. 26, 1985.)

In its recommendation for federal legislation on this subject, "in order to minimize compliance costs for firms operating in multiple jurisdictions," the ACIR proposed that a "non-discriminatory single rate" be established. (Recommendation of Advisory Commission on Intergovernmental Relations dated September 20, 1985.)

B. Collection Problems.

In the event that the customers fail to include the tax, the out-of-state mail order vendor must commence collection efforts for the tax. If the tax is not collected from the customer, all state sales/use tax laws (*See, e.g.*, N.D. Cent. Code § 57-40.2-06) impose liability for payment on the mail order vendor. Sales and use taxes are uniformly imposed on sales, not on collections. N.D. Cent. Code § 57-40.2-02.1. The North Dakota statute precludes a retailer from absorbing the tax by paying it (N.D. Cent. Code §§ 57-40.2-07(3) and 57-40.2-08) but makes no provision for the possibility that the retailer may not be able to collect the tax. A *local retailer* facing a tax-resisting customer can resolve a dispute by declining to consummate the sale until the tax is paid. Out-of-state mail order vendor collection problems are different because the customer is miles away and the out-of-state vendor's costs in collecting taxes are many times greater.[32]

C. Problems in Determining Tax Liabilities.

The out-of-state vendor faces heavier burdens than the local retailer with respect to computing the correct tax. A local retailer usually deals with customers at a given location. A mail order vendor like Quill normally has a nationwide business and receives orders from as many as

[32] *See, e.g., Hearings on H.R.1242, H.R. 1891 and H.R.3521* at 199-200 (testimony of William T. End emphasizing the difficulties associated with providing complicated rate, exemption and other information to customers by catalog and attempting to collect unpaid tax after shipment of merchandise or face payment of the tax without reimbursement); *Hearing on H.R.1242* at 129-131 (testimony of Alan Glazer regarding the burdensome costs associated with handling orders on which insufficient tax is paid, follow-up costs and the reality for such costs to overrun the amount of tax due on the particular sale).

fifty states. Sales and use tax rates must be separately computed and tax exemptions determined in each state, county or village.[33] The out-of-state vendor bears the direct tax burdens resulting from misapplication of any state tax rate and exemption; the vendor also bears the burden for processing customer refund claims for erroneously paid taxes, irrespective of whether the customer or vendor has erred.

D. Recordkeeping Burdens.

Recordkeeping for reporting and audit purposes requires maintaining separate records for every state and local taxing jurisdiction where taxes are collected. Sales and use tax rules require detailed supporting records to verify sales, taxes collected, applicable exemptions and timely remittances. Returns are required to be filed quarter-monthly, monthly or quarterly depending on state and local rules.

Computer software programs simply do not solve the cumulative compliance burdens and audit requirements with which Quill and other out-of-state vendors would be faced, nor would computers eliminate the substantial costs of collection.[34] Computers cannot defray the substantial

[33] Appendix 2 summarizes the compliance obligations and rate change effects of North Dakota's sales and use tax laws with which Quill and other mail order vendors would be required to contend. Appendix 3 summarizes some of the variations among state sales/use tax laws in the forty-five state taxing jurisdictions with which mail order vendors would be forced to contend if required to collect taxes in each jurisdiction where sales are made. Local variations to the state rules are too numerous to list and are not summarized in the Appendix.

[34] Computer tax programs are not equipped to recognize tax exemptions for products, nor can such programs judge whether products fit within a given exemption. *See, e.g., Hearing on H.R.1242*

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costs of nearly perpetual audits.[35] Computers cannot reduce the costs faced by the out-of-state mail order vendor when customers fail to pay, or underpay, the taxes due.[36] Mail order companies of necessity must rely on their customers to know the tax rate in their own jurisdiction, determine which items are and are not exempt, properly calculate the tax due, and remit it. Customers do not always have access to complete and current tax information and routinely fail to pay, or underpay, the tax due. *See* Note, *Collecting the Use Tax on Mail Order Sales*, 79 Geo.L.J. 535, 540 (1991).

The dilemma and hardship that out-of-state mail order vendors will encounter if required to collect the sales/use taxes in a large number of states and localities was underscored by this Court:

> And if the power of Illinois to impose use tax burdens upon National [Bellas Hess] were upheld, the resulting impediments upon the free conduct of its

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[34] *continued*
at 178 (testimony of Heath Line); *Hearing on S.639 and S.1099* at 52 (testimony of Robert Levering); and *Hearing on H.R.1242* at 134 (statement of Alan Glazer).

Levering, *An Examination of the Merits of Federal Legislation to Require Out-of-State Mail Order Companies to Collect State Use Taxes*. 4 NYU Inst. on State and Local Tax'n, § 8.03[1] (1986).

Touche Ross, *A Study to Determine the Economic Impact on Mail Order Firms of Multistate Sales Tax Collection* at 5 (1986).

[35] Aside from enormous recordkeeping and record production requirements, the growth in the number of taxing jurisdictions raises the specter of nearly perpetual audits. *Hearing on H.R.1242* at 31-32 (colloquy between Rep. Judd Gregg and Deputy Assistant Secretary of the Treasury O. Donaldson Chapoton). *Cf.* Brief for Appellant at 27-28, *Bellas Hess* (O.T. 1966, No. 241).

[36] "[M]ail order firms cannot effectively control the amount of tax, if any, that has been computed and submitted by the customer without a rather costly effort. I think that the mail order industry has effectively communciated their concern on this issue—a concern that appears valid based on my experience." *Hearing on S. 639 and S. 1099* at 206 (Letter from Ray Westphal to Senator Max Baucus (November 24, 1987)).

> interstate business would be neither imaginary nor remote. For if Illinois can impose such burdens, so can every other State, and so, indeed, can every municipality, every school district, and every other political subdivision throughout the Nation with power to impose sales and use taxes. The many variations in rates of tax, in allowable exemptions, and in administrative and recordkeeping requirements could entangle National's interstate business in a virtual welter of complicated obligations to local jurisdictions with no legitimate claim to impose "a fair share of the cost of the local government."
>
> * * * * *
>
> The very purpose of the Commerce Clause was to ensure a national economy free from such unjustifiable local entanglements. Under the Constitution, this is a domain where Congress alone has the power of regulation and control.

Bellas Hess, 386 U.S. at 759-60.

E. Overall Burdens on Commerce.

In deciding whether there is sufficient "nexus" to support collection of state sales/use taxes, the resulting burden must be weighed against the vendor's contacts with the taxing state. A contact that will support a slight obligation will not sustain one that is so onerous as to clog interstate markets.

To paraphrase this Court's holding in *Bellas Hess*:

> The many variations in rates of tax, in allowable exemptions and in administrative and recordkeeping requirements could entangle [Quill's] interstate business in a virtual welter of complicated obligations [to North Dakota, as well as other states which have] . . . no legitimate claim to impose a fair share of the cost of local government.

Bellas Hess, 386 U.S. at 759-60.

North Dakota would justify its policy by urging that the "privilege" of selling to customers in North Dakota is

benefit enough. At the very core of the commerce clause is the purpose of creating "an area of free trade among the several states." *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944). The practical effect of the North Dakota decision is to hold hostage the privilege of participating in the national market created by the commerce clause. If the law in this field is to change, it should originate in Congress—which is mindful of the commerce clause concerns—and not be the product of forty-five different and divergent sets of state legislation.

III. UNCERTAIN STANDARD CREATED BY NORTH DAKOTA LAW.

The uncertainty of North Dakota's "ubiquitous presence" test will create widespread confusion for the business community and for state tax administrators. Out-of-state mail order vendors operating throughout the nation will be forced to speculate whether their solicitations are sufficient to subject them to use tax obligations and will be unable to adequately forecast tax liability.[37]

Approval of the North Dakota statute is likely to spawn additional litigation. If this Court determines that Quill's solicitations in North Dakota create an "ubiquitous presence" sufficient to justify a use tax collection duty, other courts will be required to determine in future cases whether a company with one or more solicitations (and no physical

[37] The North Dakota statute uses the terms "regular and systematic solicitation" which the Tax Commissioner has interpreted as three or more mailings into the state. North Dakota's definition of this term is not consistent with other states' use of similar terms in recently enacted state "anti-*Bellas Hess*" legislation. *See* Brief of Amici Curiae, L.L.Bean, Inc. et al., Appendix C, for a listing of states that have enacted "anti-*Bellas Hess*" legislation and the various standards used by those states to establish tax nexus.

presence) may be compelled to collect use tax. Similarly, this Court will be asked to review other state "anti-*Bellas Hess*" legislation that focuses on sales rather than solicitations,[38] to determine whether $100,000 of business or ten sales or the use of credit cards[39] constitute a sufficient basis to justify the burden on interstate commerce created by requiring an out-of-state vendor having no physical presence in the taxing jurisdiction to collect taxes. The lines to establish a justifiable tax basis rule under the commerce clause should not change based on state tax administration.[40]

[38] *See, e.g.*, Minn. Stat. § 297A.21 (West Supp. 1991); Mo. Stat. Ann. § 27-67-4 (Supp. 1989); Vt. Stat. Ann. tit. 32 § 9701(9) (Supp. 1990).

[39] *See* Cal. Rev. & Tax. Code § 6203 (West Supp. 1991).

[40] Proponents and critics of the "physical presence" test alike have argued that Congress, not the judiciary, is better equipped to establish a workable "economic presence" test that will foster certainty and stability and permit interstate businesses to order their investments in reliance on clear principles. *See, e.g.*, Nagel, *The Emergence of a Single Nexus Standard*, 45 Tax Notes No. 3, 237 (October 16, 1989) at 334 ("Ideally, the Supreme Court should not be in the business of making state tax law. This is something that is best left to Congress"); Hartman, *Collection of the Use Tax on Out-of-State Mail-Order Sales*, 39 Vand. L. Rev. 993, 1028 (1986) (arguing that congressional action is needed because "[t]here appears to be no adequate judicial machinery to establish such [fair compliance] costs"); Note, *Collecting the Use Tax on Mail Order Sales*, 79 Geo.L.J. 535 at 565 (arguing that congressional action is necessary because "[w]hen Congress drafts legislation on use tax collection both the mail-order industry and the state taxing agencies are represented . . ."); Pomp, *Determining the Boundaries of a Post-Bellas Hess World*, 44 Nat'l Tax J. No. 2, 237, 239 (June 1991) (urging that federal legislation be "resurrected" because ". . . the compliance burdens [are] too significant for the issue to be left to each state acting in isolation and motivated only by its own financial interests.").

IV. CONGRESS IS THE APPROPRIATE BODY TO REGULATE AND CONTROL COMMERCE.

The distinction drawn in decisions of this Court, that physical presence within a state is required before tax obligations may be imposed upon the out-of-state vendor, is firmly imbedded in business practice and state tax administration,[41] and is a workable standard. State tax administrators, although anxious to extend their sources of revenue, have accepted for approximately twenty years this distinction.[42] In recent years a number of states have attempted to redraw this distinction and have passed "anti-*Bellas Hess*" legislation purporting to create use tax obligations for out-of-state vendors not physically present in the state.[43] Approximately nineteen states, including North Dakota, have adopted a more pragmatic alternative to collecting use taxes. Instead of requiring the out-of-state vendor to collect such taxes, these states collect the taxes directly from the consumer by providing integrated returns to facilitate use tax and income tax reporting. Other states annually issue separate use tax returns specifically designed for consumer self assessment.[44]

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[41] *Hearing on H.R. 1242* at 60-61 and *Hearing on S.1510* at 59-60 (testimony of North Dakota Senator Nething on behalf of National Conference of State Legislatures recognizing *Bellas Hess* as the standard in efforts to promote federal legislation); *Hearing on S. 1510* at 80-81 (testimony of Alan Glazer on behalf of Direct Marketing Association stating that proposed legislation to overturn *Bellas Hess* "would unfairly change the ground rules for a significant segment of American business.")

[42] *See* All States Tax Guide, (P-H 1982 ed.) ¶252, (P-H 1985 ed.) ¶252 and (P-H 1988 ed.) ¶252 for a compilation of state tax administrators' responses to questions regarding the applicability of *Bellas Hess*.

[43] These states have adopted various standards to establish tax nexus, making the use of credit cards and "800" telephone numbers, sales on approval, and similar chimerical contacts sufficient to require imposition and collection of sales and use taxes. *See* Brief of Amici Curiae, L.L. Bean et al., Appendix C.

[44] See Appendix 3.

North Dakota, however, is one of 36 states that has legislatively attempted to ignore the line drawn by *Bellas Hess*.[45] If the "physical presence" test is to be abandoned and replaced with some other standard,[46] Congress is the appropriate body to determine the extent to which out-of-state vendors should be held responsible for remitting sales and use taxes to states in which their only connection with customers is by common carrier or the United States mail and that test would be changed prospectively.

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[45] The North Dakota legislature recognized that the 1987 amendments to the North Dakota Use Tax Law when enacted conflicted with this Court's decision in *Bellas Hess*. *See* House Concurrent Resolution ("H. Con. Res.") No. 3083 (which urged Congress to enact federal legislation to allow the states to impose sales and use tax obligations on out-of-state mail order vendors) (Pet. App. A58-59); *See also* 1987 House Committee Minutes regarding H. Con. Res. 3083, where State Rep. Hoffner, who introduced H. Con. Res. 3083, urged support for the Resolution by stating:

> The [North Dakota] house of representatives passed HB 1195 some weeks ago by a wide margin and that has a fiscal positive aspect on the state of about 14.1 million dollars. *The state can only realize that revenue if Congress passes this kind of [federal] legislation* (emphasis added). (Pet. App. A60.)

HB 1195 and SB 2555 amended N.D. Cent. Code § 57-40.2-01(6) and (7), which is the subject matter of this petition.

See also Testimony Before the House Finance and Taxation Committee (Jan. 13, 1987) where State Tax Commissioner M.K. Heidi Heitkamp stated:

> [T]his Bill [HB 1195] prepares the State for immediate implementation of any federal legislation. (Pet. App. A66.)
>
> * * * * *
>
> HB 1195 is part of the Tax Department's continuing effort to stop sales and use tax loss, caused by the decision in [Bellas Hess] . . . The decision continues to allow out-of-state direct marketers . . . to refuse to collect "use" taxes from buyers . . . (Pet. App. A62.)

[46] The Brooks bills, H.R. 3521 in the 100th Congress and H.R. 2230 in the 101st Congress, contain the standard proposed by the states with respect to jurisdiction to tax interstate transactions under state sales tax laws. The standard is, in essence, the amount of sales to customers in the state. The Multistate Tax Commission has also advocated a similar standard for jurisdiction with respect to state income tax laws. (Resolution dated July 13, 1984, All States Tax Guide (P-H) ¶ 694-B).

Justices Black, Frankfurter and Douglas wrote a dissenting opinion in *McCarroll v. Dixie Greyhound Lines, Inc.*, 309 U.S. 176 (1940), wherein they said:

> Judicial control of national commerce—unlike legislative regulations—must from inherent limitations of the judicial process treat the subject by the hit-and-miss method of deciding single local controversies upon evidence and information limited by the narrow rules of litigation. Spasmodic and unrelated instances of litigation cannot afford an adequate basis for the creation of integrated national rules which alone can afford that full protection for interstate commerce intended by the Constitution. We would, therefore, leave the questions raised by the Arkansas tax for consideration of Congress in a nation-wide survey of the constantly increasing barriers to trade among the States. Unconfined by the 'narrow scope of judicial proceedings' Congress alone can, in the exercise of its plenary constitutional control over interstate commerce, not only consider whether such a tax as now under scrutiny is consistent with the best interests of our national economy, but can also on the basis of full exploration of the many aspects of a complicated problem devise a national policy fair alike to the States and our Union.

McCarroll, 309 U.S. at 188-189.

In *Stockham Valves* and *Northwestern States Portland Cement*, Mr. Justice Frankfurter said:

> Congress alone can provide for a full and thorough canvassing of the multitudinous and intricate factors which compose the problem of the taxing freedom of the states and the needed limits on such state taxing power.

Williams v. Stockham Valves & Fittings and *Northwestern States Portland Cement v. Minnesota*, 358 U.S. 450 at 476 (1959).

As stated by Justice Marshall in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981):

> [t]he nature of the factfinding and judgment that would be required of the courts merely reinforces the conclusion that questions about the appropriate level of state taxes must be resolved through the political process.

Commonwealth Edison, 453 U.S. at 628.

Indeed, there has been a long and active effort by states to expand their power to require out-of-state vendors to collect and remit sales and use taxes. Nevertheless, a coalition of local governments has thus far frustrated such efforts.[47]

If this Court abandons the physical presence test and subjects mail order vendors including Quill to state tax collection burdens, there will be economic chaos in the mail order industry. Potential retroactive liability in most states (excluding Connecticut)[48] will literally wipe out these businesses. Mail order vendors cannot collect taxes on past sales. The strong Congressional reluctance to expand the states' taxing powers by overturning the *Bellas Hess* standard is based on the conflicts between: (i) the constitutional need to eliminate cumulative substantial and discriminatory burdens on the interstate commerce of out-of-state mail order vendors; and (ii) the state and local governments' inability to get together to eliminate those burdens. This Court should not make the Congressional resolution of this conflict unnecessary; the result would be chaos.

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[47] *See* Kirschten, *Division in Mail-Order Tax Coalition*, 21 Nat'l J. No. 19, May 13, 1989 at 1195; 21 Nat'l J. No. 20, May 20, 1989 at 1266.

[48] *See SFA Folio Collections, Inc. v. Bannon*, 585 A.2d 666 (Conn.), *cert. denied*, 111 S. Ct. 2839 (1991); *Cally Curtis Co. v. Groppo*, 572 A.2d 302 (Conn.), *cert. denied*, 111 S. Ct. 77 (1990).

CONCLUSION

For the foregoing reasons, Quill respectfully requests this Court to reverse the judgment below.

Respectfully submitted,

November 21, 1991.

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APPENDICES

APPENDIX 1

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1966

NATIONAL BELLAS HESS, INCORPORATED, Appellant,	)	
vs.	)	No. 241
DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS FOR THE USE OF THE PEOPLE OF THE STATE OF ILLINOIS, Appellee.	)	

Washington, D.C.
Thursday, February 23, 1967

The above-mentioned matter came on for argument at 10:14 o'clock, a.m.

BEFORE:

EARL WARREN, Chief Justice of the United States
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
TOM C. CLARK, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON H. WHITE, Associate Justice
ABE FORTAS, Associate Justice

APPEARANCES:

ARCHIBALD COX, ESQ., Langdell Hall, Cambridge, Massachusetts; on behalf of the appellant.

TERENCE F. MacCARTHY, ESQ., Special Assistant Attorney General, State of Illinois; on behalf of the appellee.

Oral Argument of Mr. Terence F. MacCarthy, Esq.

on Behalf of Appellee

[Department of Revenue of the State of Illinois]

[pp. 22-28 omitted]

[29] MR. JUSTICE FORTAS: Mr. MacCarthy, I am interested in the degree to which you would apply your statute. I hope you will come to that. For example, suppose that Macy's had a hundred customers in the State of Illinois and that Macy's enclosed advertising literature, catalogues, as they usually do I gather in their bills that were sent to these customers every month, would your statute cover that? I hope you will come to that kind of problem.

MR. MacCARTHY: I will answer it now if I may. Yes, the terms of the statute would definitely cover that particular transaction. The statute is quite broad and it mentions advertising per se. In this regard, I might indicate that the statute here is identical—not quite in total terms but definitely in legal terms to the statute before this Court in the Scripto v. Carson case. The Illinois statute is identical. So the Court has had before it a statute identical in terms to the Illinois Statute in the Scripto case.

For that matter in the Scripto case this Court spelled out in the footnote in the margin the Florida Statute.

MR. JUSTICE HARLAN: But would you have a similarity in the two cases?

[30] MR. MacCARTHY: Well they had 10 independent contractors in the Scripto case.

MR. JUSTICE HARLAN: And it was not similar to this case?

MR. MacCARTHY: No. The distinction in Scripto is that there were 10 independent contractors or specialty brokers. Here in lieu thereof we have the catalogues.

MR. JUSTICE FORTAS: This bothers me. Suppose Macy's had only one customer in Illinois and that customer had been to New York and opened a charge account at Macy's, and then thereafter Macy's sent monthly bills and said we are going to have a White Sale and we offer you bed linen at a bargain and the customer responds to that advertising and buys bed linen. Is that enough to subject Macy's to the duty of collecting a use tax?

MR. MacCARTHY: I think the issue then would be one resolved by the courts, Your Honor, and I think the issue as I will state in my suggestion as to the law to be distilled in this field will turn on the continuous and substantial nature of the business.

MR. JUSTICE FORTAS: That is what I am trying to get at. The statute says engaging in soliciting orders, and I ask you in effect whether Illinois makes a distinction between an occasional solicitation as in the cases I put to you or a regular solicitation.

[31] MR. MacCARTHY: In direct answer to your question—

MR. JUSTICE FORTAS: In this kind of thing where you have a sort of a broadside solicitation through mail order catalogues and fliers and so forth.

MR. MacCARTHY: In answer to your question, Mr. Justice Fortas, the Illinois Statute does not make the distinction.

MR. JUSTICE STEWART: How about continuing along the line suggested by my Brother Fortas. I suppose in your Illinois newspapers on Sunday the Book of the Month Club advertises and puts a little coupon in there to send in.

MR. MacCARTHY: Yes, Mr. Justice Stewart, it does. That is the issue in the case.

MR. JUSTICE STEWART: And your statute would cover them?

MR. MacCARTHY: Our statute would cover it. I am not presenting to this Court and I would make this distinction that those particular facts would satisfy the scrutiny of The Court under a due process argument. I am, however, and I make this point quite strongly, suggesting that the Court has before it a statute identical to the statute in Scripto. The Court has before it the particular facts in this case. I would like for particular emphasis to go on. We do not have a Macy's situation, as Mr. Justice Fortas would suggest, nor do we have what I would term the occasional type of advertising.

[32] MR. JUSTICE STEWART: Every Sunday throughout the year in every Chicago Tribune Sunday Paper.

MR. MacCARTHY: I would think the issue would turn not only on the advertising itself but by the business brought by the advertising.

MR. JUSTICE STEWART: The statute I think you already said makes no such distinction.

MR. MacCARTHY: Nor did the statute in Scripto which this Court put in footnote. The statute definitely makes no distinction.

MR. JUSTICE STEWART: And the statute would cover?

MR. MacCARTHY: Yes, sir. The Illinois Supreme Court opinion definitely would not tolerate it and I doubt if the opinion of this Court would.

MR. JUSTICE BRENNAN: Mr. MacCarthy, what is this—the word "engaging"? Is that why you say there is a distinction between the situation Justice Fortas postulated and this kind of case?

MR. MacCARTHY: Mr. Justice Brennan, I don't think the distinction is to be found in the words of the statute. The statute is quite broad. I think the distinction is to be found in the interpretation of the decisions of this Court in interpreting what is required for the nexus or the minimum contact required. I think that is the issue, and I suggest that it should be addressed in this case to the particular [33] circumstances of this case and not to circumstances as they might be in a subsequent case or another case.

MR. JUSTICE WHITE: You would not really say you would argue for a different result if Bellas Hess had simply switched from sending in catalogues to regular advertisements in the newspapers and on television and radio and sold the same amount of merchandise as a result of it?

MR. MacCARTHY: No, I definitely would not, Mr. Justice White. I think the results bear the most impor-

tance, not the method of advertising but rather the results.

MR. JUSTICE HARLAN: But you got to have some kind of a rule that businessmen can understand.

MR. MacCARTHY: Definitely.

MR. JUSTICE HARLAN: At least that is desirable.

MR. MacCARTHY: Oh definitely. I think there should be some kind of a rule they should understand. And the rule that I would suggest should be distilled from the cases of this Court is a rule which businessmen should well understand, and that is simply where a business is successfully in a state from a business point of view that that should be equated with presence from a legal point of view.

MR. JUSTICE HARLAN: Do you think that is the rule that the case disclosed?

MR. MacCARTHY: I think that is the rule that the case disclosed.

[34] MR. JUSTICE HARLAN: Irrespective of any sales or other physical contacts?

MR. MacCARTHY: Correct. I think that the form, I think that the decisions of this Court, most notably the recent Scripto decision, most definitely indicate that a formal distinction should not be given overemphasis but rather matters of substance should be considered. We should look to the success of the particular business in the state and not to the original form of arrangements enjoyed in the state.

MR. JUSTICE FORTAS: What you are saying, if I understand it, is that while the language of your statute

is very broad, you say, your position is that you recognize that there are limits as a constitutional matter.

MR. MacCARTHY: Yes, I do.

MR. JUSTICE FORTAS: And those limits would depend upon the volume and frequency. What are the factors?

MR. MacCARTHY: The factors upon which the limits would depend?

MR. JUSTICE FORTAS: Yes.

MR. MacCARTHY: I would suggest that the principle to be distilled from all of these cases, the nexus cases, is first that stress should be placed on substance and not form, and, secondly, that continual and systematic activity should be distinguished from occasional or casual activities.

MR. JUSTICE BRENNAN: What substance is that?

[35] MR. MacCARTHY: I might give an example. The use of common carriers as opposed to the use of their own trucks within a state. I would think that this is a matter of substance and not form.

Thirdly, I think that the method of solicitation—

MR. JUSTICE STEWART: Do you think that is a matter of substance? Which way did that cut in this case?

MR. MacCARTHY: I do not think there should be a legal distinction between the use of a common carrier within the state.

MR. JUSTICE STEWART: You think it should be the same as Miller even though it is common carrier—not private carrier?

MR. MacCARTHY: Yes, sir.

MR. JUSTICE STEWART: You think it should be the same as Miller though. Do you think it is substance and not form or just form and not substance?

MR. MacCARTHY: I would suggest that substance should take preference over the form.

MR. JUSTICE STEWART: Which is this distinction between common carriers and their own trucks.

MR. MacCARTHY: In other words, I am suggesting that the distinction that you would make would be a form of distinction between a common carrier on the one hand and a—

MR. JUSTICE STEWART: Form and not substance.

MR. MacCARTHY: Yes.

[36] MR. JUSTICE STEWART: Your own substance.

MR. MacCARTHY: Yes.

MR. JUSTICE BRENNAN: Are you saying you would make or would not make a distinction?

MR. MacCARTHY: I am making a distinction in answer to the questions.

Thirdly, I think that the method of solicitation matters not so long as it does not bear upon the in-state efficiency of the business, and I think this is definitely a principle we can take from the Scripto case.

And finally, I think, as I have already alluded to, successful presence in an economic sense should be equated with sufficient presence in a legal sense, and this, Mr. Justice Harlan, I would suggest would be a fine rule and the best workable rule for the businessman. It is something he fully and well understands.

MR. JUSTICE HARLAN: Well how much success do you need?

MR. MacCARTHY: That I think would depend a great deal on this particular Court. I definitely think in excess of $2 million of business in a period of approximately 15-½ months any businessman would agree was economic success within the State of Illinois.

I might make another point here. There were in-state c.o.d. deliveries. Again there seems to be some question raised in the reply brief as to the propriety of our mentioning c.o.d. [37] collections within the state. The record I think bears this out. The quote that counsel mentions, the quote in their reply brief at page 8 in footnote (3) they set out a quote wherein we suggest that c.o.d. collections were made. In setting forth our quote, by the way, that is a typographical or printing error. That is page 15 of our brief and not page 17. In setting out that quote, I think in fairness they might have set forth a footnote which immediately followed that quote. In the footnote we correctly, in accordance with the record, indicated that c.o.d. collections were not the practice in all cases. Unfortunately the record does not indicate in how many instances c.o.d. collections were made. However, the fact remains that c.o.d. collections were made in Illinois. In the same footnote they seem to take issue or object to our reference to the common carriers or the postal authorities as their representatives or as their bill collectors.

Now I think two particular statements by this Court might bear upon this, and again this goes to the substance over form argument which I would now make to the Court. Mr. Justice Douglas writing in the Harvester case indicated in a similar type of case that in these circumstances we are dealing with matters of substance and not with

matters of dialect, and, further, Mr. Justice Clark writing for the majority of The Court in the most recent Scripto case said to permit such formal contractual shipments to make a constitutional difference would [38] open the gates to a stampede of tax avoidance.

MR. JUSTICE HARLAN: Mr. MacCarthy, is there any way of estimating the potentialities of this tax as a revenue measure with the volume?

MR. MacCARTHY: What? The volume?

MR. JUSTICE HARLAN: What is your in-state use tax involved? How much revenue do you have?

MR. MacCARTHY: I do not know the exact answer to that, Your Honor, as to what percentage of total revenue this would mean to the state.

MR. JUSTICE HARLAN: It would be very much larger, I suppose.

MR. MacCARTHY: If I may deposit an answer to your question, Mr. Justice Harlan, the problem is not a question of revenue to the State of Illinois. Here is the problem. I think the defendant National Bellas Hess has somewhat ill-characterized its position in this Court. They are suggesting to The Court that they are a small specialty type mail order house, one who wants to eliminate discrimination, one who wants equality of tax treatment. I do not think that the record in this case, Your Honors, or more importantly this record, the state taxation report which they rely upon, bears this particular status out for them.

If I might point to this, they make a great todo about the fact that in most states collection has not or is not [39] made in circumstances such as this. In other words, most

states do not require an out-of-state vendor to make a collection of its use tax. They make a great todo about this fact. Now this is true. There is no question about this. We are willing to admit it. Only recently has Illinois enacted such a statute. But I do not think the fact that Illinois or other states have not collected this tax in the past bears one iota on the constitutional issue before this Court. However, and this would be the point I would make, the fact that recently states have this legislation does bear upon the policy considerations and does portray National in a little different light.

I might explain this. The record is also replete with references to the fact that most of the vendor states do not require collection of this tax. Appreciating this fact, it becomes rather obvious that National Bellas Hess or these mail order houses are now in a tax sanctuary situation. They are not paying any tax, and not paying any tax are permitted to discriminate in a way against the local buyers and also against the mail order houses who do pay the tax. This I think is an important point in understanding the policy and the reason for this tax. This tax is not intended to discriminate against out-of-state buyers. The purpose of this tax is to have everyone treated equally to permit the in-state seller the same margin of profit that the out-of-state seller would have.

[40] MR. JUSTICE WHITE: So you really think this may be a business regulation or device rather than a revenue base of measuring?

MR. MacCARTHY: If you are asking me, Mr. Justice White, do I think this particular will pass—

MR. JUSTICE WHITE: No. The Illinois law is really a business regulation.

MR. MacCARTHY: Oh definitely. I think it is intended to be so.

MR. JUSTICE WHITE: And not to raise revenue?

MR. MacCARTHY: Definitely not to raise revenue. The idea is to protect, if you will, not only the local merchants but the interstate merchants who are collecting and remitting the Illinois tax.

MR. JUSTICE WHITE: How far back do you intend to collect tax? How far back are you permitted to go? When will the statute run out?

MR. MacCARTHY: Well the statute was passed in 1961. The statute was passed July 1st 1961. The particular tax in question ran from July 17, 1961, to October 31, 1962.

MR. JUSTICE WHITE: But if you wanted to against Bellas Hess, how far back could you go?

MR. MacCARTHY: July 1st 1961.

MR. JUSTICE WHITE: If you could do this and collect the use tax from Bellas Hess whether they collect it from the [41] purchaser or not, why could you not apply a sales tax to these interstate sales made by Bellas Hess to buyers in Illinois?

MR. MacCARTHY: I think I understand your question. I think we are precluded from collecting a sales tax by this Court's decision in the McLeod case.

MR. JUSTICE WHITE: Why?

MR. MacCARTHY: The McLeod case indicated that the sale would have to be within the state and we have made no argument that the sales are within the state.

MR. JUSTICE WHITE: Why should it have to be within the state?

MR. MacCARTHY: This is The Court's decision.

MR. JUSTICE WHITE: I know it. But how do you understand it? Why is there a rule against collecting a sales tax?

MR. MacCARTHY: Well the late Mr. Justice Wiley Rutledge wrote a vigorous dissent, and if I could possibly paraphrase his dissent, He did not agree that in McLeod a tax should not be collected whether or not it was a sales or use tax.

MR. JUSTICE WHITE: You would say, yes, if you can do this, you should be able to collect a sales tax?

MR. MacCARTHY: I think we are more properly in our rights collecting a use tax and this is the reason we collect a use tax.

MR. JUSTICE WHITE: You think you are constitutionally forced to collect a use tax rather than a sales tax?

[42] MR. MacCARTHY: Yes, we do. I would like for a moment to turn in conclusion to the cases real briefly. National places tremendous reliance upon the Miller case. I think that this reliance is somewhat misplaced, and I think it is somewhat misplaced because National has failed to appreciate the particular facts in Miller. I would like to briefly mention some five distinctions in Miller which I think sufficiently distinguish Miller from this case.

First of all, National in its brief and now again in its oral argument refers to the regular deliveries in Miller. Conversely the Court in deciding Miller specifically referred to these deliveries as occasional deliveries.

Again, Mr. Justice Clark in writing the Scripto decision referring to Miller referred to "occasional deliveries in Miller."

Again, in its reply brief at page 3 National refers to the regular mailings in Miller. Conversely this Court in deciding Miller referred to the occasional sales circulars in Miller.

National fails to make a distinction which I think is quite salient to Miller, and that is in the Miller case the buyers left the State of Maryland, went into the State of Delaware and at the vendor's stores made the purchase. They do not particularly give any credence to this fact. However, the majority of The Court in writing Miller specifically noted [43] that the seller in the Miller case did not know where the goods were to be used.

Mr. Justice Douglas in writing a dissent felt otherwise and believed that the seller should have known where they were used. The fact remains whether or not he did or did not know was pertinent.

Thank you, Mr. Justices.

– END –

APPENDIX 2

NORTH DAKOTA

Obligations Imposed on North Dakota Vendors: Every vendor deemed to be a "retailer maintaining a place of business" in North Dakota is required to register under the North Dakota Sales and Use Tax Acts to obtain a permit to collect the use tax, subject to all conditions and fee requirements imposed on retailers with locations or representatives in the state otherwise subject to North Dakota's sales tax provisions. N.D. Cent. Code § 57-40.2-07. Specifically, the compliance obligations placed on out-of-state vendors include:

1. registering to obtain a sales and use tax permit and complying with all application procedures, including providing specific information regarding estimated monthly sales, names of owners/corporate officers, and detailed credit information;

2. posting a bond or other security to insure payment of taxes, if required by the tax commissioner;

3. maintenance of records (invoices, receipts and other pertinent documents) for a period of three years and three months for examination by the State;

4. making records, books and papers available for inspection in North Dakota;

5. determination of the extent and application of specific exemptions from the tax including: exemptions for sales for resale (retailer must obtain a certificate of resale from the purchaser at least once a year); exemptions for sales to specific exempt organizations; exemptions for new machinery and equipment, including computers (retailer must obtain certificate); and exemptions for certain food items;

6. timely and accurate collection and/or payment of both state and locally imposed taxes;

7. preparation and timely filing of the state tax return reporting all state and local taxes;

8. determination of refunds due customers for over-collected taxes;

9. filing of refund claims for overpaid taxes on behalf of any customer erroneously paying tax;

10. administration of the collection of taxes and filing of returns to avoid violation of penalty provisions for underpayment of tax and failure to pay or file rules, which can lead to personal liability of officers; and

11. keeping abreast of the continuing changes occurring under the North Dakota Sales and Use Tax Acts including changes in compliance provisions, exemption provisions and rate changes, whether issued through the legislature, judiciary or the administrative process.

N.D. Cent. Code § 57-39.2-15, *et seq.*; N.D. Cent. Code § 57-40.2-04, *et seq.*; North Dakota Application for Sales and Use Tax Permit.

Legislative Changes: The applicable sales and use rate and the rules for determining tax due in North Dakota have been the subject of frequent changes. In North Dakota, the applicable sales and use tax rate was modified three times between January, 1987 and December, 1989. N. Dakota State Tax Reporter (CCH) ¶60-401. Two bills proposed in the 1991 legislative session, HB 1386 and SB 2580, would have changed the rate again. In 1983 and 1985, SB 2497 and HB 1663 were enacted, respectively, providing for contingent 1% increases in the sales and use tax rate depending on the general fund balance at particular points in time. Ch. 632, SB 6497; Ch. 638, HB 1663. HB 1386, referenced above, would have also imposed a 1% contingent increase based on the level of funds.

A total of twenty-five (25) different bills affecting the use tax in North Dakota have been enacted since 1987. *See* North Dakota State Tax Reporter (CCH) ¶187-060 *et seq.* Since 1967, there have been sixty-nine (69) bills enacted affecting the use tax. In addition, the last three legislative sessions have seen twenty-two (22) bills related to the use tax proposed but not passed: 1987-8; 1989-7; and 1991-7.

Local Rates: There are currently twelve cities with local taxing authority imposing rates varying from ½% to 1%: Bismarck, Minot, Fargo, Grand Forks, Dickinson, Williston, Mandan, Grafton, Harvey, Wahpeton, Devils Lake and Jamestown. An additional local city tax for Valley City is set to be imposed as of January 1, 1992. *See* N. Dakota State Tax Reporter (CCH) ¶60-403.

Exemptions: Sales of the following are exempt from tax: items purchased by certain educational, government and charitable organizations, manufacturing equipment for new and expanding facilities (including computers), food and drugs, certain medicines, and farm and feed items. *See* N. Dakota Tax Reporter (CCH) ¶60-200 *et seq.* North Dakota also exempts sales of newsprint and ink (N.D. Cent. Code §57-40.2-04(6)) and newspapers and free magazines. *Id.* §57-39.2-01(9). Each of these exemptions has certain limitations. For example, there are variations within the North Dakota food exemption. The provision exempting food and food products includes a nonexclusive laundry list of items but specifically excludes from exempt food more than nine general types of "food." N.D. Cent. Code §57-39.2-04.1.

Refund Claims: In North Dakota, a retailer maintaining a place of business that has erroneously overcollected tax must pay all tax collected to the state. If the tax is subsequently refunded to the customer, the retailer may take a credit on the next return for the tax properly refunded. N.D. Cent. Code §57-40.2-17. It is the retailer's obligation to administratively handle all claims for refund of taxes overpaid by customers even if attributable to customer error or developments subsequent to the sale. Claims for refund are allowed for the person who made the erroneous payment, if filed before the later of (1) three years of the return due date or (2) one year after the amount is paid. *Id.* §57-39.2-24 (incorporated by reference at §57-40.2-13). If a refund claim is disallowed, the denial becomes final and irrevocable within 30 days after notice unless a written protest is filed. *Id.* §57-39.2-25 (incorporated by reference at §57-40.2-13).

APPENDIX 3

ALL STATES

State Tax Rate Variations: The tax rate differences as of September, 1991, categorized by rate are as follows:

3 Percent: Colorado and Wyoming; *3.5 Percent*: Virginia; *4 Percent*: Alabama, Georgia, Hawaii, Iowa, Louisiana, Michigan, New York, North Carolina and South Dakota; *4.225 Percent*: Missouri; *4.25 Percent*: Kansas; *4.5 Percent*: Arkansas and Oklahoma; *5 Percent*: Arizona, Idaho, Indiana, Maryland, Massachusetts, Nebraska, New Mexico, North Dakota, Ohio, South Carolina, Utah, Vermont and Wisconsin; *5.5 Percent*: Tennessee; *5.75 Percent*: Nevada; *6 Percent*: California, Connecticut, District of Columbia, Florida, Kentucky, Maine, Mississippi, Pennsylvania and West Virginia; *6.25 Percent*: Illinois and Texas; *6.5 Percent*: Minnesota and Washington; *7 Percent*: New Jersey and Rhode Island.

2 State Tax Guide (CCH) ¶60-100.

In addition, the following changes in the sales/use tax rates have been recently enacted:

1) California-decrease from 6% to 5.5% no later than July 1, 1993;
2) Maine-decrease from 6% to 5% on July 1, 1993;
3) Minnesota-decrease from 6.5% to 6% on January 1, 1992;
4) Missouri-additional 1.5% use tax on July 1, 1992; and
5) Nevada-increase from 5.75% to 6.5% on October 1, 1991.

2 State Tax Guide (CCH) ¶60-100.

Local Rates: At present there are thirteen different state sales and use tax rates and hundreds of local rates which vary by jurisdiction within each state. In the states where locally imposed taxes are collected by the state, vendors must still account separately for the following local taxes in their records and/or on their state tax returns: Alabama (counties-56, cities-240+); Alaska (boroughs-5, cities-94); Arizona (counties-9, cities-84); Arkansas (counties-56, cities-138); California (counties-58, cities-2,000+); Colorado (counties-39; cities-157); Florida (counties-25); Georgia (counties-148); Illinois (counties-8, cities-46, special districts-3); Iowa (counties-13); Kansas (counties and cities-200+); Minnesota (cities-2); Missouri (counties and cities-1400+); Nebraska (cities-45); Nevada (counties-7); New Mexico (counties-32, cities-104); New York (counties-61, cities-27); North Carolina (counties-76); North Dakota (cities-12); Ohio (counties-85); Oklahoma (counties-25, cities-480); Pennsylvania (cities-2); South Carolina (counties-6); South Dakota (cities-144); Tennessee (counties-95); Texas (counties-102, cities-1800+); Utah (counties-29); Virginia (all cities and counties); Washington (counties-38); Wisconsin (counties-40); and Wyoming (counties-17). Several states have local jurisdictions which separately administer and collect local taxes: Alabama (counties-5, municipalities-41); Alaska (cities-12); Arizona (cities-12); Colorado (cities-42); Louisiana (parishes and cities-240+); and Minnesota (city-1). *See* 2 State Tax Guide (CCH) ¶60-200 *et seq.*

Exemptions: Many states provide exemptions for: manufacturing machinery and equipment (some apply reduced rate); computer hardware; materials/packaging used in certain functions or processes; pollution control equipment; and agricultural or farm related equipment. *See* 2 Multistate Corporate Tax Guide (Panel) 178-220.

Twenty-six states provide an exemption for the sale of food: Arizona, California, Colorado, Connecticut, District of Columbia, Florida, Indiana, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Jersey, New York, North Dakota, Ohio, Pennsylvania, Rhode Island, Texas, Vermont, Washington, and Wisconsin; five states exempt food sales only if purchased with federally-funded food stamps: Arizona, District of Columbia, Iowa, Kentucky and Nebraska; and six states exclude candy or gum from the definition of food: Indiana, Minnesota, New Jersey New York, Texas and North Dakota. 2 State Tax Guide (CCH) ¶60-110.

Return Filing Requirements: Thirty-nine states require monthly returns: Alabama, Arizona, Arkansas, Colorado, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, North Dakota (depending on sales level), Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota (Bi-Monthly), Tennessee, Texas, Vermont, Virginia, Washington, West Virginia and Wyoming.

Eight states require quarterly returns: California, Iowa, Missouri, New York, North Dakota, Pennsylvania, Utah and Wisconsin. All States Tax Guide (P-H) ¶250.

Refund Claims: Several states require the retailer (as opposed to the customer) to file refund claims: Alabama (joint customer/retailer petition allowed; Ala. Admin. Code r. 810-6-4-.16), Florida (Fla. Admin. Code r. 12A-1.014), Missouri (Mo. Code Regs. tit. 12, §10-4.255), and Texas (Tex. Admin. Code, tit. 34, §3.325). Kansas, Ohio and South Dakota require retailer claims unless the customer has

paid the tax directly to the state. Kan. Admin. Regs. 92-19-49: Ohio Admin. Code §5703-9-07; and South Dakota Rev. Info. Bull. re: Retailer refund claims.

Bond/Security and Service of Process: In thirty-six states the tax commissioner may require a retailer to post a bond or security when registering with the state to collect sales and use taxes: Ala. Code §40-23-24 (1990); Ariz. Rev. Stat. Ann. §42-1305.01 (1991); Ark Reg. GR-88; Cal. Rev. & Tax Code §6701 (West 1987); Conn. Gen. Stat. §12-430 (1983); Fla. Stat. Ann. §212.14(4) (West 1987); Idaho Code §63-3625 (1989); Ill. Ann. Stat. ch.120, ¶441a (Smith-Hurd 1991); Indiana Code §6-2.5-8-1 (1989); Iowa Code §422.30 (1990); Kan. Stat. Ann. §79-3616 (1989); Ky. Rev. Stat. Ann. §139.660 (Michie/Bobbs-Merrill 1991); Me. Rev. Stat. Ann., tit. 36 §1759; Md. Tax-Gen. Code Ann. §13-824(g) (1988); Mass. Regs. Code tit. 80, §62C.66.1 (1988); Mich. Comp. Laws §205.53 (1986); Minn. Stat. §297A.28 (1991); Miss. Code Ann. §27-65-27 (1990); Mo. Rev. Stat. §144.087 (Supp. 1991); Neb. Rev. Stat. §144.087 (Supp. 1991); Nev. Rev. Stat. §372.510 (1986); N.J. Rev. Stat. §54:32B-18 (1986); N.Y. Tax Law §1137(e) (McKinney 1987); N.C. Reg. 46; N.D. Cent. Code §57-40.2-07 (1987); Okla. Stat. tit. 68, §1368 (1986); Pa. Stat. Ann. tit. 72, §7277 (1990); R.I. Gen. Laws §44-19-23 (1990); S.D. Cod. Laws Ann. §10-46-24 (1989); Tenn. Code Ann. §67-6-522 (1989); Tex. Tax Code Ann. §151.251 (West 1982); Utah Code Ann. §59-12-107 (1990); Vt. Stat. Ann. tit. 32, §9776 (1981); Va. Code Ann. §58.1-630 (Michie 1991); W.Va. Code §11-15A-12 (1989); and Wis. Stat. §77.61 (1989).

Seven states require the out-of-state vendor to appoint the Secretary of State as agent for service of process for sales/use tax purposes: Ga. Code Ann. §48-8-65 (Michie 1982); Ill. Ann. Stat. ch. 120, ¶444i (Smith-Hurd 1991);

Nev. Rev. Stat. §372.540 (1986); Ohio Rev. Code Ann. § 5739.131 (Anderson 1986); Pa. Stat. Ann. tit 72, § 7245 (1990); R.I. Gen. Laws § 44-19-34 (1990); and Tex. Tax Code Ann. §151.606 (West 1982).

Self-Assessment of Tax By Purchasers: Nine states utilize a mechanism for collecting use tax from purchasers by providing a separate line item on the individual income tax return filed by residents (references to 1990 tax forms): Idaho (Form 40, line 44), Indiana (Form IT-40, line 18), Kentucky (Form 740, line 23), Maine (Form 1040ME, line 19), New Jersey (Form NJ-1040, line 28), Utah (Form TC-40, line 19), Vermont (Form 103, line 9), West Virginia (Form IT-140, line 8), and Wisconsin (Form 1, line 17). Nine states, including North Dakota, provide a separate self-assessment return, often specifically referenced in the instructions to the individual income tax return: Illinois (Form ST-44), Michigan (Form C-3001), Minnesota (Form UT-1), Nevada (Form DOT-ST-19), North Carolina (Form E-554), North Dakota (F22, North Dakota Use Tax Return), South Dakota (Form TF-125, Use Tax Form and Booklet), Virginia (Form ST-7), and Washington (Form REV 83.2501). Although California does not provide a separate form, specific reporting instructions are provided in the instructions to Forms 540A and 540, the individual income tax returns.

Anti-Bellas Hess Legislation: In addition to North Dakota, the following states have enacted anti-*Bellas Hess* legislation: **Alabama:** Ala. Code §§40-23-1 (Supp. 1990) (eff. 4-30-86) and 40-23-68 (eff. 9-01-91); **Arizona:** Ariz. Rev. Stat. Ann. §42-1401 (1991) (eff. 9-15-89); **Arkansas:** Ark. Code Ann. §§26-53-102 and 26-53-121 (Mich. 1987) (eff.

2-11-87); **California**: Cal. Rev. & Tax. Code §6203 (West Supp. 1991) (eff. 1-01-88, rev. 3-88); **Colorado**: Colo. Rev. Stat. §§39-26-102 (Supp. 1990) and 39-26-301 *et seq.* (Supp. 1990) (becomes effective when authorized by federal legislation); **Connecticut**: Conn. Gen. Stat. §12-407 (West Supp. 1991) (eff. 7-01-89, rev. 10-89); **Florida**: Fla. Stat. §§212.0596 and 212.05 (1987) (eff. 10-01-87); **Georgia**: Ga. Code Ann. §48-8-2(3)(H) (Supp. 1991) (eff. 7-01-90); **Idaho**: Idaho Code §63-3611 (1989) (eff. 7-01-89); **Illinois**: Ill. Ann. Stat. ch. 120, ¶439.2 (Smith-Hurd 1991) (eff. 1-01-90; **Iowa**: Iowa Code Ann. §422.43(12) (West 1990) (eff. 7-01-88); **Kansas**: Kan. Stat. Ann. §79-3702 (1989) (eff. 7-01-90); **Kentucky**: Ky. Rev. Stat. Ann. §139.340 (Michie/Bobbs-Merrill 1991) (eff. 7-15-88); **Louisiana**: La. Rev. Stat. Ann. §§47:301(4)(l) (West Supp. 1991) (eff. 10-90) and 47:305(E) (West Supp. 1991) (effective when authorized by federal legislation); **Massachusetts**: Mass. Gen. Laws Ann. ch. 64H, §1 (1991), Tech. Info. Release 88-13 (1988) (holds application until authorized by federal legislation); **Minnesota**: Minn. Stat. §297A.21 (West Supp. 1991) (eff. 6-01-88); **Mississippi**: Miss. Code Ann. §§27-67-3 and 27-67-4 (1990) (eff. 7-01-88); **Missouri**: Mo. Rev. Stat. §§144.605(2) and (14) (West Supp. 1991) (eff. 10-01-90); **Nebraska**: Neb. Rev. Stat. §77-2702(21) (1990) (eff. 10-01-87); **Nevada**: Nev. Rev. Stat. §372.728 (Supp. 1989) (eff. 10-01-89); **New Mexico**: N.M. Stat. Ann. §7-9-10 (1990) (eff. 7-01-90), N.M.G.R. Tax Reg. 3(E):4 (eff. 7-01-91); **New York**: N.Y. Tax Law §1101(b)(8) (McKinney 1987 and West Supp. 1991) (eff. 9-01-89); **North Carolina**: N.C. Gen. Stats. §§105-164.3 and 105.164.8 (1989) (eff. 1-01-89); **Ohio**: Ohio Rev. Code Ann. §5741.01(H) (Supp. 1990) (eff. 10-05-87); **Oklahoma**: Okla. Stat. Ann. tit. 68, §§1354.3 and 1354.5 (West Supp. 1991) (eff. 7-01-86, rev. 6-87); **Rhode Island**: R.I. Gen. Laws §44-18-23 (Supp. 1990) (eff. 9-01-90); **South Carolina**:

S.C. Code Ann. §§12-35-95 and 12-36-80 and 12-36-70 (Law. Co-op. Supp. 1990) (eff. 6-22-87); **South Dakota**: S.D. Cod. Laws Ann. §§10-46-1 and 10-46-18.3 (1989) (eff. 7-01-87); **Tennessee**: Tenn. Code Ann. §17-6-102(6) (1989) (eff. 1-01-89); **Texas**: Tex. Tax Code Ann. §151.107 (West Supp. 1991) (eff. 7-22-87, rev. 10-01-87); **Utah**: Utah Code Ann. §59-12-107(1) (West Supp. 1991) (eff. 7-01-90); **Vermont**: Vt. Stat. Ann. tit. 32, §9701(9) (1981 and Supp. 1990) (eff. 7-01-90); **Virginia**: Va. Code Ann. §58.1-612(c) (Michie 1991) (eff. 1991); **Washington**: Wash. Rev. Code Ann. §82.12.040(1) (West Supp. 1991), Wash. Admin. Code R. 458-20-221 (eff. 4-89 by regulation); and **West Virginia**: W.Va. Code §11-15A-6a (Supp. 1991) (eff. 7-01-89).

APPENDIX 4

National Meat Ass'n. v. Deukmejian, 743 F.2d 656, 658 n.1 (9th Cir. 1984), *aff'd*, 469 U.S. 1100 (1985) (reviewing nexus required for taxation of interstate commerce and noting lack of physical presence in *Bellas Hess*); *Aldens Inc. v. LaFollette*, 552 F.2d 745, 752-53 (7th Cir. 1977) (recognizing *Bellas Hess* as establishing the commerce and due process clause standards for taxing interstate vendors); *Aldens Inc. v. Packel*, 524 F.2d 38, 43 (3rd Cir. 1975), *cert. denied*, 425 U.S. 943 (1976) (citing *Bellas Hess* for the due process standard applied in tax cases); *Direct Marketing Association v. Bennett*, No. Civ. S-88-1067 (E.D. Cal. 1991) (1991 U.S. Dist. LEXIS 10736) (prohibiting California from imposing use tax collection obligations on mail order vendors whose only connection with the state is solicitation of sales and acceptance of credit cards issued by California financial institutions); *Evanston Ins. Co. v. Merin*, 598 F.Supp. 1290, 1305 (D.N.J. 1984) (focusing on *Bellas Hess* as the "leading case defining the minimal connection required" before a state can impose tax liability); *Strescon Industries, Inc. v. Cohen*, 508 F.Supp. 786, 788-89 (D. Md. 1981), *aff'd*, 664 F.2d 929 (4th Cir. 1981) (recognizing *Bellas Hess* as the standard which would apply to determine constitutional nexus); *Aldens, Inc. v. Miller*, 466 F.Supp. 379, 382-83 (S.D. Iowa 1979), *aff'd* 610 F.2d 538 (8th Cir.), *cert. denied*, 446 U.S. 919 (1980) (due process nexus standard of *Bellas Hess* applies to tax cases); *Confederated Tribes of the Colville Indian Reservation v. State of Washington*, 446 F.Supp. 1339, 1357 (E.D. Wash. 1978), *rev'd in part*, 447 U.S. 134 (1980) (under *Bellas Hess*, commerce clause test is satisfied if "some definite link" or "minimum connection" with the taxing jurisdiction); *Boswell v. Paramount Television Sales, Inc.*, 282

So.2d 892, 897 (Ala. 1973) (recognizing that *Bellas Hess* requires physical presence); *White v. Kimberly-Clark Corporation*, 503 So.2d 296, 301 (Ala. Cir. App. 1986), *aff'd* 503 So.2d 304 (Ala. 1987) (quoting *Wisconsin v. J.C. Penny Co.* as cited in *Bellas Hess* for the due process standard established by these cases); *Illinois Commercial Men's Ass'n v. State Bd. of Equal.*, 671 P.2d 349, 355 (Cal. 1983), *app. dism'd*, 466 U.S. 933 (1984) (distinguishing *Bellas Hess* because presence of agents in state in this case formed "minimum connection" required to justify imposition of tax); *Montgomery Ward & Co. v. State Board of Equal.*, 78 Cal. Rptr. 373, 381 (Cal. Ct. App. 1969), *cert. denied*, 396 U.S. 1040 (1970) (analyzing *Bellas Hess* and the constitutional principles addressed therein); *Associated Dry Goods v. City of Arvada*, 593 P.2d 1375, 1377 n.2 (Colo. 1979) (recognizing that delivery by mail or common carrier is insufficient nexus connection for taxation); *SFA Folio Collections, Inc. v. Bannon*, 585 A.2d 666, 670 (Conn.), *cert. denied*, 111 S. Ct. 2839 (1991) (holding nexus requirement of *Bellas Hess* not satisfied where mail order company mailed catalogs, provided toll-free "800" number and used magazine advertising to solicit sales from in-state customers); *Cally Curtis Co. v. Groppo*, 572 A.2d 302, 305 (Conn.), *cert. denied*, 111 S. Ct. 77 (1990) (following *Bellas Hess* in finding company not taxable based on leased films in the state); *Reader's Digest Ass'n v. Mahin*, 255 N.E.2d 458, 460 (Ill. App.), *cert. denied*, 399 U.S. 919 (1970) (finding nexus based on resident solicitors and local advertising); *Good's Furniture House, Inc. v. Iowa State Board of Tax Review*, 382 N.W.2d 145, 149-50 (Iowa), *cert. denied*, 479 U.S. 817 (1986) (finding nexus test as refined by *Bellas Hess* and *National Geographic* satisfied by in-state activities); *Sabine Pipe and Supply Company v. MacNamara*, 411 So.2d 1167, 1169 (La. App. 1982) (rec-

ognizing state cannot compel out-of-state seller to collect use taxes under *Bellas Hess* although taxes collected voluntarily must be paid over to state); *Burke & Sons Oil Co. v. Director of Revenue*, 757 S.W.2d 278, 280 (Mo. App. 1988) (stating that *Bellas Hess* establishes that "communicating with customers in a state by mail or common carrier as part of a general interstate business does not create a sufficient nexus"); *Alaska Airlines, Inc. v. Dept. of Revenue*, 769 P.2d 193, 198 (Or. 1989), *cert. denied*, 110 S. Ct. 717 (1990) (noting that *Bellas Hess* provides the standard by which nexus is judged); *Bloomingdale's By Mail, Ltd. v. Commonwealth of Pennsylvania*, 567 A.2d 773, 777 (Pa. Commw. 1989), *aff'd per curiam*, 591 A.2d 1047 (Pa. 1991), *cert. applied for sub nom. Penn. v. Bloomingdale's By Mail, Ltd.*, No. 91-383 (applying commerce clause and due process clause standards of *Bellas Hess* in analyzing whether mail order vendors had sufficient nexus with state); *Fingerhut Corporation v. Commonwealth Pennsylvania*, 275 F&R 1990, 1990 Pa. Tax LEXIS 1048 (Pa. Commw. 1990) (holding out-of-state vendor conducting business by mail, telephone and common carrier not liable under holdings of *Bellas Hess* as well as other U.S. Supreme Court and Pennsylvania court decisions); *L.L. Bean, Inc. v. Commonwealth of Pennsylvania*, 516 A.2d 820 (Pa. Commw. 1986) (holding insufficient nexus between mail order company and state based on *Bellas Hess* and *Miller Bros.*); *Pearle Health Services, Inc. v. Taylor*, 799 S.W.2d 655, 658 (Tenn. 1990) (citing *Bellas Hess* as the standard for constitutional limits on taxing companies whose only contact is by mail and common carrier); *Rowe-Genereux, Inc. v. Vermont*, 411 A.2d 1345, 1348 (Vt. 1980) (citing *Bellas Hess* in analyzing long line of tax nexus standard cases). *See also Land's End, Inc. v. California State Board of Equalization*, No. 620135 (San Diego Superior Court, Cal. 1991), *appeal docketed*, No. D014839 (Cal. App. 4th July 15, 1991) and *Sturbridge Yankee Workshop, Inc. v. State Board of Equalization*, No. 512584 (Sacramento Superior Court, Cal. 1991), *appeal docketed*, No. C011169 (Cal. App. 3d May 30, 1991) (holding out-of-state mail order vendors not liable for collection of California use taxes on facts substantially similar to *Bellas Hess*).

(23)

No. 91-194

Supreme Court,
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DEC 26
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In The

Supreme Court of the United States

October Term, 1991

QUILL CORPORATION,

Petitioner,

v.

STATE OF NORTH DAKOTA,
by and through its Tax Commissioner,
HEIDI HEITKAMP,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of The State Of North Dakota

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether, under the commerce clause and the due process clause of the fourteenth amendment, North Dakota may apply its use tax collection statute to a direct marketer that has established minimum contacts with the state by purposefully availing itself of carrying on business within the state.

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No. 91-194

In The

Supreme Court of the United States

October Term, 1991

QUILL CORPORATION,

Petitioner,

v.

STATE OF NORTH DAKOTA,
by and through its Tax Commissioner,
HEIDI HEITKAMP,

Respondent.

On Writ Of Certiorari To The Supreme Court Of The State Of North Dakota

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

North Dakota use tax law requires "every retailer maintaining a place of business in this state" to collect use tax from its customers. N.D. Cent. Code § 57-40.2-07 (Supp. 1991). In 1987 the definition of "retailer maintaining a place of business" was amended to include a retailer who regularly or systematically solicits sales in North Dakota through various means of communication. N.D. Cent. Code § 57-40.2-01(7) (Supp. 1991); Pet. App. A47-A48. "Regular or systematic solicitation" is defined

as three or more separate transmittances of advertisements during a specified twelve month period. N.D. Admin. Code § 81-04.1-01-03.1(3); Pet. App. A56-A57.

Petitioner Quill Corporation ("Quill"), one of the nation's largest direct marketers of office supplies and equipment, is incorporated in Delaware, and maintains its principal place of business in Lincolnshire, Illinois, with offices and warehouses in Illinois, California, and Georgia. J.A. 28.

Quill solicits sales through the mailing of catalogs and advertising flyers to customers throughout the United States, including several thousand North Dakota customers. J.A. 29; Brief in Response to Defendant's Motion for Partial Summary Judgment and in Support of Tax Commissioner's Cross-Motion for Summary Judgment, Mar. 18, 1990, ("T.C. Response") Ex. D at 8-9.

Proceedings Below

Respondent State of North Dakota ("North Dakota"), through its State Tax Commissioner ("Tax Commissioner"), notified Quill in 1989 that Quill was statutorily required to obtain a permit and remit use tax on its sales to North Dakota customers. J.A. 6. When Quill failed to comply, North Dakota filed a declaratory judgment action in North Dakota district court asking that Quill be declared a retailer maintaining a place of business in North Dakota. J.A. 5-6. Quill resisted, arguing that N.D. Cent. Code §§ 57-40.2-01(6),(7) and 57-40.2-07, as applied to Quill, violate the due process and commerce clauses of the United States Constitution as interpreted in *National*

Bellas Hess, Inc. v. Department of Revenue, 386 U.S. 753 (1967). J.A. 14-17.

Deciding cross-motions for summary judgment, the district court found persuasive the state's arguments that the use tax statute as applied to Quill was constitutional, Pet. App. A40; however, the court concluded that the facts in *Quill* were indistinguishable from the facts in *Bellas Hess* and held that the statute was unconstitutional as applied to Quill. Pet. App. A42. North Dakota appealed to the North Dakota Supreme Court. Notice of Appeal, June 27, 1990; J.A. 2. On review, the North Dakota Supreme Court reversed, concluding that

> Quill's significant economic presence within the State and its retained ownership of property within the State generate a constitutionally sufficient nexus to justify imposition of the purely administrative duty of collecting and remitting the use tax.

Pet. App. A35-A36. Quill then petitioned this Court for review. The Court granted review on the first question presented in Quill's petition (concerning the application of *Bellas Hess* to this case) and denied review on the second question presented (concerning the retroactivity of a holding that Quill is required to collect the use tax). J.A. 52.

Statement of Facts

Quill enjoyed annual gross sales in excess of $200,000,000 nationwide and North Dakota gross sales in excess of $970,000 during the tax periods at issue. T.C. Response, Ex. D at 6-7. Quill's net North Dakota sales

(gross sales less returns) were $925,000 annually, making Quill the sixth largest retailer of office supplies and equipment in North Dakota. *Id.*; J.A. 38-39; J.A. 43. Quill paid neither the North Dakota use tax nor the Illinois sales tax on its North Dakota sales. T.C. Response, Ex. D at 5-6.

Quill sells more than 9,500 different office products ranging from computers to staples. T.C. Response, Ex. D at 6. All of the office products Quill sells to North Dakota consumers are subject to the state's sales or use tax if purchased by anyone other than a person holding an exemption or a resale certificate. *Id.* Quill's principal customers are businesses that purchase Quill's products for their own use. Quill has 3,427 active North Dakota customers, and advertises its products to the North Dakota customers and others by mailing catalogs and flyers, by placing advertising materials in nationally circulated card packs, and by placing magazine advertisements in nationally distributed periodicals and trade journals. T.C. Response, Ex. D at 8, 10, 11-12, 13.

Quill solicits North Dakota businesses with 62 different bulk mailings of its catalogs and flyers annually, sending 230,000 pieces of mail, weighing more than 48,000 pounds, into the state each year. T.C. Response, Ex. D at 9-10. Quill's active customers may receive as many as five different mailings per month. Schwartz, "Quill Bares Its Teeth in Battle with Office Supply Superstores," 30 *Adweek's Marketing Week*, Nov. 27, 1989, at 19. Quill employees also conduct telephone solicitations of its active North Dakota customers. T.C. Response, Ex. D at 11-13 and Ex. I at 2.

Quill maintains a telephone bank of 95 operators in Lincolnshire, Illinois, to receive customer orders. Of the more than 200,000 nationwide orders Quill receives each month, approximately 50% are received by phone, with the remaining orders taken by a combination of mail, fax, telecopy, telex, and computer modem. T.C. Response, Ex. D at 14-15.

Quill service representatives communicate, by telephone, with customers to assist in the selection of custom printing orders and to handle problems with the print orders forwarded to Quill. T.C. Response, Ex. H at 9 and Ex. F at 10-11. Quill maintains a telephone "help line" to assist customers with questions or problems that may arise after the customer receives the merchandise. T.C. Response, Ex. I at 6-7.

Quill has licensed to North Dakota customers a computer software program, Quill Service Link ("QSL"), which allows direct communication between Quill and its customers via computer modem. T.C. Response, Ex. F at 8-9 and Ex. A attached thereto. Quill issues a packet containing two floppy diskettes to the customers who purchase QSL. The customers must insert the diskettes into their own computers to communicate with Quill. T.C. Response, Ex. I at 20-21. Quill retains title to the diskettes and the software program while the diskettes are in the customer's possession. T.C. Response, Ex. F at 8-9 and Ex. A attached thereto. With QSL, a customer may determine inventory availability, check price lists, order merchandise, and communicate with others having access to Quill's computers via an electronic bulletin board. *Id.* Quill can also initiate communications with its customers via QSL. *Id.*

All of Quill's merchandise is sold on the basis that its customers must be "100% satisfied." To back this guarantee, Quill provides free trial periods and a ninety-day period within which the customer may return merchandise to Quill for any reason. T.C. Response, Ex. F at 14-15 and Ex. B attached thereto. Prices in Quill's semiannual catalogs are guaranteed for six months and in its sales flyers for up to two months. T.C. Response, Ex. H at 9 and Ex. 5 attached thereto at 1.

Before December 1989 Quill sold merchandise only upon an open account, accepting only money orders or checks drawn on the customer's bank account. T.C. Response, Ex. D at 20 and Ex. K at 4. In December 1989 Quill began accepting credit cards as payment in all states except North Dakota. T.C. Response, Ex. H at 16-21 and Dep. Ex. 1 attached thereto.

Quill employees conduct credit checks on its customers, telephoning North Dakota customers and North Dakota banks and financial institutions to verify credit information. T.C. Response, Ex. D at 22-23 and Ex. F at 3. Credit checks on certain customers are also performed by Quill employees at the Illinois location by mail, telephone, and telecopy. *Id.*

Quill directly competes with North Dakota office supply and equipment retailers. T.C. Response, Ex. M. Quill employees conduct telephone price surveys of various merchants in order to price Quill's products competitively. *Id.* Potential Quill customers in North Dakota have used Quill's catalogs and flyers to negotiate lower prices from local office supply and equipment retailers. *Id.* These customers then have told North Dakota retailers

that they do not want to pay the North Dakota sales tax because Quill does not charge tax on its sales. T.C. Response, Ex. D at 11-13 and Ex. I at 2.

Direct marketing has been defined by industry experts as "the distribution of goods, services, or information to targeted consumers through response advertising while keeping track of sales, interest, behavior, wants and needs in a relational computer database." Rapp, "The Tower of Babel," 54 *Direct Marketing Magazine* 1, May 1991, at 76. Direct marketers today use a full panoply of communications techniques, including bulk mailings, telephone and fax communications, and computer technology, as well as other telemarketing methods.[1]

The mail order component of direct marketing (referred to by one author as "direct-order-marketing") has been further described as

> all forms of business based on selling goods or services directly to the public without an intermediary, while obtaining orders by means of direct-response advertising in magazines and newspapers, on television or radio, by direct mail or in any other medium and delivering [the product or service] to the customer's address.

Id. It is estimated that between 65% and 75% of all American households now receive mail order catalogs each year. Fishman, *1990 Guide to Mail Order Sales* (Lincolnshire, Illinois: Marketing Logistics, Inc.) 1991, at X-13.

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[1] For in-depth factual treatment of the mail-order industry and the use tax collection issue, see Defendant's Brief in Response to Plaintiff's Cross-Motion for Summary Judgment and Reply Brief, Ex. N.

In 1990 alone 13.7 billion catalogs were mailed; this amounts to a 74% increase since just 1982. Direct Marketing Association, Inc., *DMA Statistical Fact Book 1991-1992* ("DMA Stat. Book") at 88. Quill, by itself, accounts for the mailing of 65,000,000 pieces of mail a year. Schwartz, *supra*, p. 4 at 18-19.

Outbound telemarketing (the solicitation of business by telephone) has grown dramatically in the past decade because of the reduction in the cost of long-distance telephone service. Spending on outbound telemarketing is now estimated at $30,000,000,000 annually. Baier, Hoke, Jr., Stone, "Direct Marketing Flow Chart," 54 *Direct Marketing Magazine* 6, Oct. 1991, at 2.

In the 1990's undoubtedly even more direct marketers will follow Quill's lead in relying on technological advancements in computer software programming, database management, fax machines and telephones to communicate more effectively with customers than by mail.[2] Direct marketing service experts have predicted that in the 1990's direct marketers will receive more orders by fax than by mail, and that more catalogs will be delivered in the format of interactive media, such as

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[2] A database provided by one computer service company costs only $695 and provides information useable by business-to-business direct marketers on 7,000,000 companies, segmenting these companies by geographic area, sales volume and industry type. *See* 54 *Direct Marketing Magazine* 4 (Aug. 1991), at 14. Additionally, the National Center for Database Marketing has even been developed to present conferences on the use of databases for direct marketing. 53 *Direct Marketing Magazine* 10 (Feb. 1991), at 25-26.

television, video disk and on-line computer systems. Haggin and Kartomten, "Predictions for the 1990's," 7 *Catalog Age* 3, Mar. 1990, at 95-96.

Interactive voice response technology will be in widespread use in the near future. This technology permits a customer to place an order by merely pressing a few buttons on a touch-tone telephone. Deloitte and Touche, *A Special Report on the Impact of Technology on Direct Marketing in the 1990s* (New York: Direct Marketing Association, Inc.) 1990, at 45-47. Interactive television, which is currently being developed, provides a direct electronic linkage between the viewer and the broadcaster. Future transmission of interactive television via fiber-optic cable will enable the viewer to request specific product displays on the viewer's television screen at any time and to place purchase orders directly over the same cable that sends the television program. *Id.* at 51.

Based in part upon the technological advancements described above, the direct marketing industry has grown from sales of $2,400,000,000 in the days of *Bellas Hess* to a $130,400,000,000 industry today. *See Bellas Hess*, 386 U.S. at 763; Advisory Commission on Intergovernmental Relations ("ACIR"), *State Taxation of Interstate Mail-Order Sales: Revised Revenue Estimates, 1990-1992*, Dec. 1991, at 3 (report updating the ACIR's two earlier reports, *State and Local Taxation of Interstate Mail Order Sales* (A-105), Apr. 1986, and *Estimated Revenue Potential from State Taxation of Out-of-State Mail Order Sales* (SR-5), Sept. 1987. As a direct result of the shifting of purchases to out-of-state direct marketers, the 1991 uncollected use tax loss from mail order sales is estimated to be $3,080,000,000 with a $3,270,000,000 projected tax loss for 1992. *Id.* at 2.

SUMMARY OF ARGUMENT

In accordance with the fundamental fairness principle that is at the heart of both the due process and commerce clauses, North Dakota may constitutionally impose a use tax collection obligation on Quill, a direct marketer that has established minimum contacts with the state by purposefully availing itself of the substantial privilege of carrying on business within the state.

The essence of Quill's argument is that this Court's 1967 decision in *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), established a rule that a state may impose a use tax collection obligation only on an out-of-state business that has a physical presence in the state. Pet. Br. at 18. Assuming this is the correct construction of *Bellas Hess*, the underpinnings of that decision have been repudiated by this Court. Further, under current commerce clause and due process jurisprudence, fundamental fairness is served when a multistate business having sufficient minimum contacts with a state pays for the benefits it receives from the state and competes on a level playing field with other businesses.

Bellas Hess is grounded on an interpretation of the commerce clause that prohibited all state taxation of businesses engaged in interstate commerce. This Court rejected that formalistic free trade interpretation of the commerce clause in 1977. In *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), the Court, instead, adopted a

test that considers the practical effects of a tax statute on multistate businesses. Under the *Complete Auto* four-prong test, application of a state tax statute to multistate businesses is constitutional when the tax: 1) is applied to an activity with a substantial nexus with the taxing state; 2) is fairly apportioned; 3) does not discriminate against interstate commerce; and 4) is fairly related to the services provided by the state. *Id.* at 279.

The second and third prongs of the *Complete Auto* test state traditional commerce clause principles: A state may only tax its fair share of an interstate transaction (avoiding duplicative taxation), and multistate businesses must be allowed to compete with local business on a fair, nondiscriminatory basis. The commerce clause does not create a nationwide tax-free haven for multistate business. North Dakota's use tax statute comports with these commerce clause principles because it cannot result in duplicative taxation and treats multistate business on the same terms as in-state business.

The remaining prongs of the *Complete Auto* test embody traditional due process concerns of fair play and substantial justice. Applying the due process principles that govern both personal jurisdiction and taxing jurisdiction, a state may impose a tax on a multistate business when that business has sufficient minimum contacts with the state, *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and there is a fair relation between the tax and the benefits received, *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435 (1940). This due process fairness standard has been articulated more clearly in the taxing context in decisions concluding that authority exists when a marketer has purposefully "avail[ed] itself of the substantial privilege

of carrying on business within the State." *Mobil Oil Corp. v. Commissioner*, 445 U.S. 425, 437 (1980). This functional test, which permits a court to consider a variety of factors in determining nexus, is more fundamentally fair than an arbitrary physical presence test which is dependent upon what may be the mere happenstance of the location of a piece of property.

Quill has regularly and systematically solicited North Dakota's consumer market through its bulk mailings into the state, and telephone, fax, telex, and computer modem connections with its North Dakota customers. It is the sixth largest retailer of office supplies and equipment in North Dakota. Quill has received substantial benefits from the state, including state laws that create the commercial structure within which an orderly marketplace may function. Requiring Quill to pay its own way for these benefits is not only fair to Quill and the state, but also to the local merchants and multistate direct marketing businesses that have physical property in the state.

Quill's administrative cost of complying with the North Dakota use tax statute is simply a cost of doing business and is irrelevant to the constitutional analysis. In addition, computer technology already exists which would allow Quill to comply readily with its use tax collection obligations. Requiring Quill to collect and remit the state's use tax would not be unduly burdensome and would not violate either the due process clause or the commerce clause.

Even under the nexus test Quill promotes, Quill has sufficient contacts in North Dakota to require Quill to comply with its use tax law. These contacts include: 1)

Quill's retention of title to the QSL diskettes and software property that its customers use in North Dakota; 2) Quill's many telephone, telex, fax, and computer modem connections with North Dakota residents; and 3) Quill's delivery into North Dakota of 24 tons of catalogs and advertising flyers that must be processed through North Dakota's waste disposal system.

A decision that Quill must bear the administrative duty of collecting the state's use tax from its North Dakota customers will result in Quill, its multistate and in-state competitors, and the citizens of North Dakota being accorded the fairness the Constitution requires.

ARGUMENT

I. THE PHYSICAL PRESENCE TEST ESPOUSED BY QUILL IS NOT SUPPORTED BY THE CASE LAW AND DOES NOT ACHIEVE THE FAIR RESULT REQUIRED BY THE DUE PROCESS AND COMMERCE CLAUSES.

North Dakota imposes a sales tax on sales of tangible personal property made within the state's boundaries. N.D. Cent. Code ch. 57-39.2 (1983 & Supp. 1991). North Dakota also imposes a use tax on the in-state use of property which was purchased outside of the state and upon which no sales tax was paid. *Id.* ch. 57-40.2. The state sales and use tax rates are identical. *Id.* §§ 57-39.2-02.1, 57-40.2-02.1 (Supp. 1991).

State use taxes are enacted to prevent state residents from avoiding payment of the state sales tax by making purchases outside the state. In addition, use tax laws "put

local retailers subject to the sales tax on a competitive parity with out-of-state retailers exempt from the sales tax." *National Geographic Soc'y v. California Bd. of Equalization*, 430 U.S. 551, 555 (1977); *see also Boeing Co. v. Omdahl*, 169 N.W.2d 696, 714 (N.D. 1969). This Court has recognized the "impracticability of collecting the state's use tax from the multitude of individual purchasers." *National Geographic*, 430 U.S. at 555. Because of this collection difficulty, states place the burden of collecting use taxes on out-of-state sellers. *See generally* Hartman, *Collection of the Use Tax on Out-of-State Mail-Order Sales*, 39 Vand. L. Rev. 993, 994-95 (1986); McCray, *Commerce Clause Sanctions Against Taxation on Mail Order Sales: A Re-Evaluation*, 17 Urb. Law. 529, 557 (1985).

In 1967 this Court held that state and local governments may not impose a use tax collection duty on an out-of-state mail order firm that communicates with local purchasers in the taxing jurisdiction only by mail or common carrier as part of a general interstate business. *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967). Quill construes *Bellas Hess* as holding that out-of-state firms must maintain a physical presence in a state to be subject to the state's tax jurisdiction. *See* Pet. Br. at 18.

Bellas Hess, a national mail order firm, argued that the Illinois statutes requiring it to collect use taxes violated the due process clause and created an unconstitutional burden on interstate commerce. The Court found the application of the Illinois statutes to Bellas Hess unconstitutional, but it did not clearly articulate whether its holding was grounded on the commerce clause, the

due process clause, or both. *Bellas Hess*, 386 U.S. at 756, 758-760.

Whatever the doctrinal basis for the *Bellas Hess* decision, the case is distinguishable from the facts here because, unlike Bellas Hess, Quill owned property physically present in the taxing jurisdiction.[3] The more fundamental reason for not applying *Bellas Hess* to this case is that the underpinnings of that decision have been removed by this Court's subsequent decisions and does not comport with current due process and commerce clause jurisprudence. Therefore, the argument that a physical presence in the taxing jurisdiction is required for taxing authority to exist should be rejected.

II. THE *BELLAS HESS* DECISION WAS BASED ON THE FREE TRADE COMMERCE CLAUSE DOCTRINE THAT WAS OVERRULED IN *COMPLETE AUTO*.

Because it is unclear whether the *Bellas Hess* holding was grounded on the due process clause or the commerce clause, both issues will be addressed in this brief. However, due process decisions rendered at the time of the *Bellas Hess* decision and the language of *Bellas Hess* itself indicate that the ruling was based primarily, if not completely, on commerce clause considerations.

At the same time the Court decided *Bellas Hess*, it dismissed for want of substantial federal questions two

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[3] See discussion of Quill's contacts with North Dakota, *infra*, at 29-31, 45-47.

appeals in which state courts, under the due process clause, had found taxing or regulatory nexus where there was no in-state physical presence. The two cases involved pure due process considerations because they concerned the insurance industry, an area over which Congress has removed all commerce clause restrictions. *McCarran-Ferguson Act*, ch. 20, 59 Stat. 33 (1945) (codified as amended at 15 U.S.C. §§ 1011-1015 (1982)). In *Ministers Life & Casualty Union v. Haase*, 30 Wis. 2d 339, 141 N.W.2d 287, *appeal dismissed*, 385 U.S. 205 (1966), the state court upheld state taxation and regulation of an out-of-state insurance company that did business only by mail and national advertisements. In *People v. United Nat'l Life Ins. Co.*, 66 Cal. 2d 577, 427 P.2d 199, 58 Cal. Rptr. 199, *appeal dismissed*, 389 U.S. 330 (1967), the court held that the state could require an out-of-state insurance firm to obtain a certificate of authority to sell insurance by mail. These summary dismissals demonstrate that even at the time *Bellas Hess* was decided, the Court did not require physical presence to establish nexus under the due process clause.

The language of *Bellas Hess* also demonstrates that the decision was premised on a "free trade" interpretation of the commerce clause. The Court wrote:

> [i]f the power of Illinois to impose use tax burdens upon [Bellas Hess] were upheld, the resulting impediments upon *the free conduct* of its interstate business would be neither imaginary nor remote. . . .
>
> The very purpose of the Commerce Clause was to ensure a *national economy free from such unjustifiable local entanglements*. Under the Constitution, this is a domain where Congress alone has the power of regulation and control.

Bellas Hess, 386 U.S. at 759-60 (emphasis added) (footnote omitted). This analysis embodies the very essence of the free trade rule articulated in *Freeman v. Hewitt*, 329 U.S. 249 (1946), and in *Spector Motor Serv., Inc. v. O'Connor*, 340 U.S. 602 (1951), *overruled*, *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). *Freeman* and *Spector* stood for the proposition that "a tax on the 'privilege' of engaging in an activity in the State may not be applied to an activity that is part of interstate commerce. . . . [This] rule reflect[ed] an underlying philosophy that interstate commerce should enjoy a sort of 'free trade' immunity from state taxation." *Complete Auto*, 430 U.S. at 278 (footnote omitted).

The *Bellas Hess* commerce clause analysis, which was based on the free trade, tax immunity approach of *Freeman* and *Spector*, has been soundly rejected by this Court because it did not address "the problems with which the Commerce Clause is concerned." *Id.* at 288. To the extent that *Bellas Hess* has been interpreted to require physical presence for taxing nexus, the fundamental change in the law under *Complete Auto* compels a rejection of that interpretation.

III. THE NORTH DAKOTA USE TAX STATUTE IS CONSTITUTIONAL AS APPLIED TO QUILL BECAUSE IT SATISFIES THE FOUR-PRONG TEST OF *COMPLETE AUTO* AND DUE PROCESS CASE LAW.

The most basic goal of the commerce clause is to ensure that out-of-state businesses are not placed at a

competitive disadvantage and may compete with local businesses on a level playing field. *See Complete Auto*, 430 U.S. at 288 (1977) (quoting *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254-256 (1938)). Where interstate commerce is accorded equal treatment with local commerce, the challenged state tax will be sustained. *See, e.g., Tyler Pipe Industr., Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232, 243-247 (1987); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 272 (1984); *Maryland v. Louisiana*, 451 U.S. 725, 759 (1981); *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 331 (1977).

It is indeed ironic that Quill relies upon the commerce clause to maintain a tax-free mail order haven. Instead of "employing the Commerce Clause as a shield against unfair, discriminatory practices [that favor] local merchants, Quill . . . raises the Commerce Clause as a sword to carve out a tax-free mail order niche and gain an unfair competitive advantage over local retailers." *North Dakota v. Quill Corp.*, 470 N.W.2d 203, 215 (N.D. 1991) Pet. App. A25.

Quill's theory places multistate businesses not on a level playing field with "Main Street" businesses but in a privileged position and at a competitive advantage. This Court has rejected this result. In *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 623-24 (1981), the Court found:

> The exploitation by foreign corporations . . . of intrastate opportunities under the protection and encouragement of local government offers a basis for taxation as unrestricted as that for domestic corporations. . . . To accept appellants' apparent suggestion that the Commerce Clause prohibits the States from requiring an activity

> connected to interstate commerce to contribute to the general cost of providing governmental services, as distinct from those costs attributable to the taxed activity, would place such commerce in a privileged position. But . . . [i]t was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business.

(Citations and internal quotation marks omitted.)

All businesses that have sufficient contacts with a state must pay their own way. Requiring those businesses to collect the state's use tax ensures a level commercial playing field; this is all that North Dakota seeks.

In *Complete Auto* the Court rejected the formalistic *Spector* rule that any direct tax on interstate commerce is unconstitutional *per se* and, instead, adopted a test based on the practical effects of the tax statute in question. *Complete Auto*, 430 U.S. at 279. Under the rule announced in *Complete Auto*, a state tax will survive a commerce clause challenge "when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Id.*

A. The North Dakota Use Tax Statute Is Fairly Apportioned And Does Not Discriminate Against Interstate Commerce.

The second and third prongs of the *Complete Auto* test address traditional commerce clause concerns, i.e., apportionment and allocation.

"Fair apportionment" of taxes requires that each state tax only its fair share of an interstate transaction; this avoids the risk of multiple taxation. *Goldberg v. Sweet*, 488 U.S. 252, 260-261 (1989). Because the use tax at issue here is assessed on individual sales to individual consumers and is collected by the retailer for each such purchase, the transaction cannot result in duplicative taxation. Additionally, in the unlikely event that a sales or use tax has already been paid on the same item or transaction, North Dakota provides a credit for that amount, thus precluding any actual multiple taxation. N.D. Cent. Code §§ 57-40.2-04(1), 57-40.2-11 (1983 & Supp. 1991).

The North Dakota use tax collection responsibility does not discriminate against interstate commerce by allocating a larger share of the tax burden to out-of-state retailers. The state sales tax rate is the same as the state use tax rate, the collection responsibility is applied uniformly to sales made by in-state retailers and by out-of-state retailers, and the same administrative allowance is provided to both in-state and out-of-state retailers. *See id.* §§ 57-39.2-02.1, 57-39.2-12.1, 57-40.2-02.1 (Supp. 1991), 57-40.2-07.1 (Supp. 1991).

B. *Complete Auto* And The Due Process Clause Require Minimum Contacts With The State And A Fair Relationship Between The Tax Imposed And The In-State Activities.

The first and fourth prongs of the *Complete Auto* test are "a minimal connection between the interstate activities and the taxing State, and a rational relationship

between the income attributed to the State and the intrastate values of the enterprise." *Trinova Corp. v. Michigan Dep't of Treasury*, 111 S. Ct. 818, 828 (1991) (quoting *Mobil Oil Corp. v. Commissioner of Taxes of Vt.*, 445 U.S. 425, 436-437 (1980)) (internal quotation marks omitted). The Court has recognized that these two prongs of the *Complete Auto* test embody due process principles. *Id.* ("The *Complete Auto* test, while responsive to Commerce Clause dictates, encompasses as well the[se] Due Process requirement[s]. . . . "); *see also Amerada Hess Corp. v. Director, Div. of Taxation*, 490 U.S. 66, 79 (1989) ("[T]he *Complete Auto* test encompasses due process standards."); I J. Hellerstein, *State Taxation*, § 4.8 (1983). Therefore, the first and fourth prongs of the *Complete Auto* test may be analyzed in conjunction with the due process clause.

The due process nexus requirement is grounded on the principle that a state may not assert authority over an out-of-state entity in a manner that "offend[s] 'traditional notions of fair play and substantial justice.' " *International Shoe*, 326 U.S. at 316. This "fair play" principle assures that "the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state." *J.C. Penney* at 444.[4]

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[4] Although the Court certainly has the power to delineate constitutional standards for state tax statutes, the Court has maintained a long tradition of allowing states to set their own revenue policies:

> Nothing can be less helpful than for courts to go beyond the extremely limited restrictions that the Constitution places upon the states and to inject

(Continued on following page)

The controlling question here is whether it is fundamentally fair for North Dakota to require Quill to collect the North Dakota use tax. *International Shoe* and *J.C. Penney* established the two elements of the due process taxing jurisdiction standard: 1) minimum contacts (*International Shoe*) and 2) a fair relation between the tax and benefits received (*J.C. Penney*). These two elements both relate to the fundamental fairness of imposing a tax. Fundamental fairness is the essence of the due process clause. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477-478, 487 (1985).

Nothing in the policies underlying the requirements of the due process clause suggest that a business, such as Quill, which conducts a regular and systematic retail sales campaign in competition with North Dakota "Main Street" retailers, must be exempt from all state taxation. This is particularly the case when the levy involved is a use tax, for which "[t]he out-of-state seller becomes liable . . . only by failing or refusing to collect the tax from that resident consumer. . . . [T]he sole burden imposed upon the out-of-state seller by [a use tax statute] is the administrative one of collecting it." *National Geographic*, 430 U.S. at 558. It hardly offends traditional due process

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> themselves in a merely negative way into the delicate processes of fiscal policy-making. We must be on guard against imprisoning the taxing power of the states within formulas that are not compelled by the Constitution but merely represent judicial generalizations exceeding the concrete circumstances which they profess to summarize.

J.C. Penney, 311 U.S. at 445.

notions of fair play to make the marketer the tax collector for the State when the taxed activity results from the marketer intentionally projecting its presence into the state. *See General Trading Co. v. State Tax Comm'n of Iowa*, 322 U.S. 335, 338 (1944).

1. Quill Has Minimum Contacts Sufficient To Satisfy The Due Process And Commerce Clause Requirements.

a. The same minimum contacts standard should be applied in tax jurisdiction and personal jurisdiction cases.

The Court held in *International Shoe*, a case involving both personal jurisdiction and taxing jurisdiction, that due process objections to personal jurisdiction and state taxing authority are judged by the same standard: "The activities which establish [the taxpayer's] 'presence' subject it alike to taxation by the state and to suit to recover the tax." *International Shoe*, 326 U.S. at 321. This is hardly surprising, as the "minimum contacts" formula is the touchstone in each setting. *See Burger King*, 471 U.S. at 474 (personal jurisdiction); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (personal jurisdiction); *National Geographic*, 430 U.S. at 561 (taxing authority); *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 345 (1954) (taxing authority).

The Court in *Shaffer v. Carter*, 252 U.S. 37 (1920), recognized that jurisdiction to tax is coextensive with personal jurisdiction. In upholding the imposition of the Oklahoma income tax law to nonresidents with property

or business in the state, the Court held that "[g]overnmental jurisdiction in matters of taxation, as in the exercise of the judicial function, depends upon the power to enforce the mandate of the state by action taken within its borders, either *in personam* or *in rem*." *Id.* at 49.

In addition to these cases, logic compels application of the same minimum contacts standard to personal and taxing jurisdiction questions. There is no qualitative difference between the consequences of a state's exercise of taxing authority and personal jurisdiction which would justify a more stringent test, or closer contacts, in the taxing case. There are potential burdens on out-of-state entities in both instances.

Imposition of a use tax collection responsibility requires collection and remittance of use tax. This is an obligation that is fixed and easy to ascertain. An out-of-state enterprise is only required to collect the statutorily established use tax and remit that amount to the state.

In the personal jurisdiction situation, an out-of-state business may be haled into a state's court and required to defend itself against any number of citizens' claims. The business must incur the cost of litigating a case outside its home state and may encounter the uncertainties of a trial before a court or jury in that "foreign" jurisdiction. In some instances, a state's exercise of personal jurisdiction over an out-of-state business may result (directly or indirectly) in extensive and continuing regulation of that business. For example, a defendant may face the possibility of a large damage award in a products liability case and be required to modify its business practices accordingly. In environmental and other regulatory cases, a state

court exercising long-arm jurisdiction may impose even more direct regulation on an out-of-state business over which it has personal jurisdiction. In other cases that are appropriate for the forum state's exercise of its equitable powers, businesses may be permanently enjoined from or mandated to perform certain duties. *See* Rothfeld, "Mail-Order Sales and State Jurisdiction to Tax," 53 *Tax Notes* 12, Dec. 23, 1991, at 1410-1414.

The performance of an administrative duty, such as use tax collection, is not, as a constitutional matter, so different from other legal duties that a separate jurisdictional test is required. As long as the tax complies with the fair relations test of *J.C. Penney*, notions of fundamental fairness do not require a closer connection to tax than those required for an appearance in court.

b. Physical presence is not a necessary element of nexus for either personal jurisdiction or tax jurisdiction.

In personal jurisdiction cases, the Court has established that physical presence is not necessary for a state to exercise its jurisdiction. The Court held in *Burger King* that

> [j]urisdiction in these circumstances may not be avoided merely because the defendant did not *physically* enter the forum State. Although territorial presence frequently will enhance a potential defendant's affiliation with a State and reinforce the reasonable foreseeability of suit there, it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire

> communications across state lines, thus obviating the need for physical presence within a State in which business is conducted. So long as a commercial actor's efforts are "purposefully directed" toward residents of another State, [the Court] ha[s] consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there.

Burger King, 471 U.S. at 476 (emphasis in original); *see also Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984).

This Court has recently articulated how the nexus standard should apply to tax jurisdiction. The Court has held that taxing authority exists when the marketer has purposefully "avail[ed] itself of the substantial privilege of carrying on business within the State," *Mobil Oil Corp. v. Comm'r*, 445 U.S. 425, 437 (1980), or when "the activities performed in [the] state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in the state," *Tyler Pipe Industr., Inc. v. Washington State Dep't. of Revenue*, 483 U.S. 232, 250 (1987). This standard provides a functional test by which taxing nexus should be judged.

While physical presence may be relevant to a nexus inquiry, this Court has not equated nexus and physical presence. In *Miller Bros.*, upon which the *Bellas Hess* Court relied, 386 U.S. at 756-57 n.9, the Court applied a nexus standard that requires a purposeful direction of commercial activities (often shown by regular or systematic solicitations) directed at in-state residents. There the Court held that Maryland lacked jurisdiction to impose a use tax collection responsibility on an out-of-state firm

that, on occasion, sent its own delivery trucks into Maryland because there was "no invasion or exploitation of the consumer market in Maryland." *Miller Bros.*, 347 U.S. at 347.

The due process analysis "cannot be simply mechanical or quantitative," *International Shoe*, 326 U.S. at 319, or "formulary," *J.C. Penney*, 311 U.S. at 445. Although a physical presence test may be simple and absolute in its approach, it is incomplete and falls short of fully addressing economic realities. The ease with which a test may be administered is not determinative of the test's constitutional merit. As the Court recognized in *Complete Auto*,

> [i]t might also be argued that adoption of a rule of absolute immunity for interstate commerce . . . would relieve this Court of difficult judgments that on occasion will have to be made. We believe, however, that administrative convenience, in this instance, is insufficient justification for abandoning the principle that "interstate commerce may be made to pay its way."

Complete Auto, 430 U.S. at 288-289 n.15.

Strict adherence to the concept of physical presence "is, as far as due process is concerned, the most pointless sort of formalism." Rothfeld, *supra*, p. 25 at 1413. Under the "bright line" physical presence test advocated by Quill, if a small multistate business were to sell a machine for $1,000 and hire an in-state contractor to install the machine, nexus would exist. In contrast, there would not be nexus when a multistate business systematically solicited the state's consumer market, sold millions of dollars of machinery, yet avoided maintaining an office, an

employee, a contractor, or a piece of property in the state. Traditional due process notions of fair play and substantial justice are not satisfied by such a result.

The more reasoned approach here is to apply the due process minimum contacts standard provided by this Court in personal jurisdiction cases. This approach will best ensure that the ultimate purpose of the due process clause, fundamental fairness, is satisfied.[5]

It is beyond argument that North Dakota courts could assert personal jurisdiction over Quill if, for example, an in-state purchaser brought suit because he was injured by one of Quill's products. *See Burger King*, 471 U.S. at 473; *World-Wide Volkswagen*, 444 U.S. at 297-298; *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957); *Hust v. Northern Log, Inc.*, 297 N.W.2d 429, 433 (N.D. 1980). In fact, Quill has never argued in the present case that the North Dakota courts lacked jurisdiction to resolve this dispute.

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[5] The alleged commercial need for a bright line test is satisfied in the present case. By regulation, North Dakota has established a bright line. That is, a North Dakota use tax collection responsibility is invoked in any year Quill mails three or more separate bulk solicitations into the state. N.D. Admin. Code § 81-04.1-01-03.1(3). This bright line is not dependent on the sometimes fortuitous physical presence or "warm body" analysis. Hartman, *supra*, p. 14 at 1014. Rather, Quill has complete control over the events which lead to use tax collection responsibility. Other states have established similar de minimus standards. *See* note 19, *infra*.

c. Quill has purposefully availed itself of the privilege of carrying on business in North Dakota.

Quill concedes that it has regularly and systematically solicited North Dakota's consumer market. Memorandum in Support of Defendant's Motion for Partial Summary Judgment, Dec. 18, 1989, at 10. Quill has purposefully "avail[ed] itself of the substantial privilege of carrying on business" within North Dakota. *Mobil Oil*, 445 U.S. at 437. During the 12-month period at issue, Quill mailed 230,000 pieces of mail, weighing more than 24 tons, to North Dakota residents.[6] Quill sent 62 different bulk mailings into North Dakota in the 12-month period. In contrast, Bellas Hess mailed two catalogs per year into Illinois to its active or recent customers; it also occasionally mailed flyers to both active and potential customers. *Bellas Hess*, 386 U.S. at 754. Quill directly entered the North Dakota market through its regular and systematic mailings to North Dakota consumers. These mailings created tons of garbage, which remain in North Dakota landfills.

Quill is in close communication with its North Dakota customers, providing services traditionally performed only by local merchants. Quill targets its active

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[6] Quill mails into North Dakota each year 230,000 written solicitations in the form of bulk mailing of semiannual catalogs, monthly sales flyers, monthly tabloids, monthly multimailers, bimonthly computer supplies flyers, bimonthly furniture and office machine flyers, imprint products flyers, legal flyers, card packs, and tilling flyers. T.C. Response, Ex. D at 10. On the average Quill made more than one mailing per week to its active North Dakota customers.

customers in North Dakota, on an average basis sending them as many as five mailings per month. Quill maintains a telephone bank of operators to receive customer orders. Approximately 50% of the orders Quill receives are made by phone, with the remaining orders taken by a combination of mail, fax, telephone, telex, and computer modem. Quill maintains a telephone "help line" to assist customers with questions or problems that may arise after the customer receives the merchandise.

Quill's QSL software permits direct communications between Quill and its customers. With QSL, a customer may determine inventory availability, check price lists, order merchandise, and communicate with others having access to Quill's computers via an electronic bulletin board. Quill also can initiate communications with its customers via QSL.[7]

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[7] Quill's high-tech use of computer connections with its customers is representative of similar advancements being used by the direct marketing industry. Two nationwide networks, Prodigy and CompuServe, provide home shopping services via computer modem and now have more than 1.3 million subscribers. Fishman, "Mail Order Top 250," 54 *Direct Marketing Magazine* 3, July 1991, at 41-43. Through their computers Prodigy subscribers can make purchases of goods, services and securities, write checks, conduct other banking transactions and have access to more than 40 companies; more than 100 companies are accessible in CompuServe's "Electronic Mall." *Id.* at 40, 43. These networks are experiencing explosive growth, driven by the rapid penetration of personal computers into American households. Prodigy membership grew 125% in 1990 and CompuServe grew 77%. *Id.* at 40-41. Electronic purchasing transactions on Prodigy quadrupled in 1990. "On-Line Services," 53 *Direct Marketing Magazine* 9, Jan. 1991, at 14. It is

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Quill's activities in the state have resulted in annual untaxed sales of nearly $1,000,000 to North Dakota customers. Through Quill's electronic communication and sophisticated computer marketing and mailing list techniques, Quill has intentionally projected its presence into the state and systematically exploited North Dakota's markets. It would be anomalous to hold that commercial entities may escape all taxation by the states from which they draw substantial benefits simply because they do not have a contractor, employee, traveling salesman, or office location in the state. Quill's almost $1,000,000 in annual sales proves it is present in North Dakota. Requiring Quill to collect the North Dakota use tax comports with fundamental fairness.

2. The North Dakota Use Tax Law Is Fairly Related To Quill's North Dakota Activity.

The fair relation test established in *J.C. Penney* and embodied in the fourth prong of the *Complete Auto* test is

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predicted that there will be increased public acceptance of "video-text services" like Prodigy and CompuServe, thus increasing the shift of the sales tax base from customers of store-bound retailers to those using cable, fiber optic, and satellite communications. Deloitte and Touche, *supra*, p. 9 at 50. Marketers consider video-text users to be a highly desirable market segment. *Id.* CompuServe estimates that the average income of its household subscribers is $86,200. Fishman, "Mail Order Top 250," 54 *Direct Marketing Magazine* 3, July 1991, at 42. Thus, those without access to in-home computers with which to shop will continue to pay sales tax, while those having such access will often be able to avoid, should they desire to do so, the direct payment of any sales or use tax.

satisfied when "the measure of the tax [is] reasonably related to the extent of the contact." *Commonwealth Edison*, 453 U.S. at 626. This Court consistently has rejected assertions that the tax must be fixed or prorated to benefits to be constitutional. Rather, it is enough that a state "runs mass transit and maintains public roads which benefit [the taxpayer's] customers, and supplies a number of other civic services," *D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 32 (1988), makes possible " 'the benefit of a trained work force,' " *Commonwealth Edison*, 453 U.S. at 624 (citations omitted), or offers the taxpayer "other advantages of civilized society," *Goldberg*, 488 U.S. at 267. In such cases the tax is adequately "tied to the earnings which the State . . . has made possible, insofar as government is the prerequisite for the fruits of civilization for which, as Mr. Justice Holmes was fond of saying, we pay taxes." *J.C. Penney*, 311 U.S. at 446; *see also Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 188-191 (1989).

The Court repeatedly has held that there need not be a dollar-for-dollar correlation between the benefits conferred by the state and the tax imposed on an out-of-state commercial entity:

> [t]he tax which may be imposed on a particular interstate transaction need not be limited to the cost of the services incurred by the State on account of that particular activity. . . . On the contrary, "interstate commerce may be required to contribute to the cost of providing *all* governmental services, including those services from which it arguably receives no direct 'benefit.' "

Goldberg, 488 U.S. at 267 (emphasis in original) (quoting *Commonwealth Edison*, 453 U.S. at 627 n.16).

While it would be impossible to enumerate every way in which North Dakota services benefit Quill, many are readily apparent. State and local governments build and maintain the roads that permit Quill to ship its goods from out-of-state. The state also provides other general services that benefit Quill. North Dakota devotes a major portion of its resources to the education of its citizens, thereby encouraging a prosperous economy for the benefit of all businesses. The state-supported education system contributes to an ordered and civilized society, which benefits direct marketers as well as local businesses. These services alone would be sufficient to invoke the use tax collection duty.

North Dakota and its local governments also provide other services that are more directly related to the success of Quill and other direct marketers. One such benefit is the provision of reliable telephone service, which is regulated by the North Dakota Public Service Commission. *See* N.D. Cent. Code § 49-02-01 (Supp. 1991).

The benefits that direct marketers derive from state regulation of telephone service are closely intertwined with the benefits conferred by state regulation of financial institutions. *See id.* § 6-01-04 (1987). Modern direct marketers depend heavily on credit checks. The credit check system functions well because the state closely regulates banks, other financial institutions, and creditor networks. Quill employees also conduct credit checks on North Dakota customers by telephoning North Dakota financial institutions. Quill uses this information to make

decisions about extending credit before shipping goods to North Dakota. Thus, Quill relies upon and benefits from this assistance.

North Dakota laws protect transactions and support orderliness in the state's marketplace. *See* N.D. Cent. Code chs. 28-01.1 (Products Liability Act), 41-02 (Uniform Commercial Code sales provisions), 51-10 (Unfair Trade Practices Act), 51-12 (prohibits false advertising), 51-13 (Retail Installment Sales Act), 51-14 (regulates revolving charge accounts), 51-15 (concerning consumer fraud and unlawful credit practices), 51-18 (regulates home solicitation sales), § 54-12-17 (creating consumer fraud and antitrust division to protect against fraud). These laws directly benefit Quill's commercial activities within North Dakota.

Also, North Dakota provides and maintains a judicial system for the enforcement of a direct marketer's property and contract rights, as well as for the collection of its debts. While the record does not reflect that Quill used North Dakota's courts to enforce its contracts or other rights, the state judicial system must remain open and available to Quill should it seek judicial recourse. If Quill decides to enforce collection of its delinquent North Dakota accounts, it must do so in the North Dakota courts. *See Spiegel, Inc. v. Federal Trade Comm'n*, 540 F.2d 287 (7th Cir. 1976) (holding it an unfair trade practice for a mail order firm to sue in its own state of commercial domicile and requiring the firm to sue in the court of the customer's residence).

Without state and local garbage disposal services and regulation, Quill could not conduct its business in the same fashion. In Quill's case, approximately 40% of its

catalogs are sent to prospective customers.[8] "1990 Direct Mail Order Roundup," 53 *Direct Marketing Magazine* 9, Jan. 1991, at 12. Most direct marketing mail solicitations are unwanted; nearly one-half are disposed of unopened and unread. *Time*, Nov. 26, 1990, at 54; *see also* Pet. App. at A34 n.14. Common sense dictates, and the North Dakota Supreme Court found, that "[i]t is the mail order seller who derives the most direct benefit from its own mailings, and it therefore is not unreasonable to assume that the seller derives some measure of benefit from the entity that is ultimately responsible for disposing of the veritable mountain of trash created thereby." Pet. App. at A34-A35; *see also D.H. Holmes*, 486 U.S. at 24, 32. Under traditional nexus principles, Quill receives the benefits and protections of North Dakota laws and services through the disposal of its trash in North Dakota.

Absent the role of government, Quill could not effectively penetrate and saturate local markets. It is entirely appropriate and consistent with both the due process and commerce clause to require that direct marketers pay for their fair share of local services. Compliance with the use tax collection duty is a minimal obligation to impose upon a business that reaps such great rewards from the state's marketplace.

Therefore, the North Dakota use tax statute does not violate the commerce clause or the due process clause.[9]

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[8] Quill's activity is close to average for business-to-business direct marketers, 48% of whose mailings are sent to prospects. DMA Stat. Book at 201.

[9] Although Quill and its amici have raised the specter of retroactivity in their briefs, that issue is not before the Court.

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IV. NATIONWIDE APPLICATION OF THE NORTH DAKOTA SUPREME COURT'S RULING WILL NOT CONSTITUTE AN UNCONSTITUTIONAL BURDEN ON INTERSTATE COMMERCE.

A. Administrative Costs Related To Use Tax Compliance Are Constitutionally Allowed.

Under the four-part *Complete Auto* test, the existence of a nondiscriminatory cost associated with the collection of a use tax is irrelevant to the commerce clause inquiry. *See* 430 U.S. at 288-89. As stated in *Complete Auto*,

> the court has rejected the proposition that interstate commerce is immune from state taxation:
>
> > "It is a truism that the mere act of carrying on business in interstate commerce does not exempt a corporation from state taxation. 'It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business.' "

430 U.S. at 288 (quoting *Colonial Pipeline Co. v. Traigle*, 421 U.S. 100, 108 (1975)).

Because the North Dakota statute does not require Quill to incur costs which are greater than the administrative costs imposed on its competitors, the commerce

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The Court denied certiorari on that question. Also, because the Commissioner has not attempted to collect use taxes from Quill, the record is silent on the issue. Finally, retroactivity raises a separate and distinct consideration under the due process clause. *See Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). That separate question need not be decided in this case.

clause is satisfied. For a multistate company that chooses to enter several states' markets and has sufficient minimum relevant contacts with those states, the administrative cost of collecting a use tax in those states is a constitutionally permissible cost of choosing to enlarge its marketplace. A holding to the contrary would discriminate against local businesses and direct marketing competitors simply because those entities have physical property in a state.

There is no logical reason for differentiating between multistate direct marketing businesses such as Sears or J.C. Penney and their direct marketing competitors. Sears or J.C Penney must pay the administrative costs of collecting state and local taxes in each state. *See Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359, 364-65 (1941) (holding that costs and inconvenience of use tax collection are a legitimate "price of enjoying the full benefits" of being privileged to do business in-state); *Nelson v. Montgomery Ward*, 312 U.S. 373 (1941).

The decisions holding that nationwide retailers like Sears must collect sales or use taxes on their catalog sales further demonstrate that an administrative burden associated with use tax collection is irrelevant to the commerce clause inquiry. If the existence of such a cost were sufficient to establish a commerce clause violation for direct marketers like Quill, it should also be sufficient for Sears and J.C. Penney. Yet, the Court has held that those retailers must collect those taxes in each jurisdiction in which they do business. *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359 (1941); *Nelson v. Montgomery Ward*, 312 U.S. 373 (1941).

Further, Quill's argument is premised on the *Spector/Freeman* tax immunity principle that was rejected in *Complete Auto*. *Spector* and *Freeman* were grounded on a "burden" argument not unlike that Quill raises here. In *Freeman*, for example, the Court stated:

> [a] State is . . . precluded from taking any action which may fairly be deemed to have the effect of *impeding* the fair flow of trade between States. It is immaterial that local commerce is subjected to a similar *encumbrance*. . . . A *burden* on interstate commerce is none the lighter and no less objectionable because it is imposed by a State under the taxing power rather than under manifestations of police power in the conventional sense . . . . Moreover, the *burden* on interstate commerce involved in a direct tax upon it is inherently greater, certainly less uncertain in its consequences, than results from the usual police regulations. . . . Because the greater or more threatening *burden* of a direct tax on commerce is coupled with the lesser need to a State of a particular source of revenue, attempts at such taxation have always been more carefully scrutinized. . . .

Freeman, 329 U.S. at 252-253 (emphasis added). As discussed above, the Court has overruled the *Spector/Freeman* rule, concluding that a state tax may impose a burden on businesses engaged in interstate commerce, as long as that tax satisfies the four-pronged test set out in *Complete Auto*.

Acceptance of Quill's argument that the North Dakota use tax is unconstitutional because it is burdensome would return this Court to the discredited *Spector* rule. A multistate business may have more total administrative costs related to use tax collection because it is

present in multiple taxing jurisdictions. However, the business has voluntarily incurred these costs to avail itself of the benefits of a larger market base. This is a cost of "paying its own way" in the states in which it has chosen to exploit the markets.

B. The Cost Of Compliance With The North Dakota Use Tax Law Is Not Burdensome Or Unfair.

Even if Quill's administrative cost in collecting use taxes for multiple jurisdictions were relevant to the constitutional analysis, those administrative costs, when realistically analyzed, are reasonable and do not justify granting Quill immunity from the state use tax collection requirements.

North Dakota has not sought Quill's collection and payment of any local government use tax. The North Dakota Tax Commissioner seeks only the collection of the state use tax. Appellant's N.D.S.Ct. Br. at 35. North Dakota, therefore, respectfully suggests that the Court reserve for an appropriate case the issue of the alleged administrative burden of collecting local government use taxes. However, should the Court reach that issue in this case, there is sufficient information available upon which the Court may conclude that this alleged burden is not constitutionally significant.

The simplest solution to complying with use tax obligations rests on the same technology that has allowed the direct marketing industry to flourish. Computer software companies, such as Vertex, Inc., and AVP Systems, now

offer off-the-shelf tax compliance software.[10] The Vertex and the AVP compliance systems run on mainframes, minicomputers, or IBM-PC compatibles. Both contain complete, regularly updated state and local use tax rate information for every taxing district in the country and cross-reference tax rates by city name and Zip Code. The compliance systems calculate the tax on each transaction by integrating the tax rate information directly into the direct marketer's own computerized billing system. The systems also automatically generate state and local tax returns, on appropriate forms, for each taxing district.[11] *See generally* Westphal, *The Computer's Role in Simplifying Compliance with State and Local Taxation*, 39 Vand. L. Rev. 1097 (1986); *1988 Hearings, infra*, p. 48 at 415, 620-36. They are available at prices ranging from $7,000 to $12,000.

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[10] No such systems existed in 1967. Vertex released its tax rate system in 1975; AVP released its system in 1979. Westphal, *The Computer's Role in Simplifying Compliance with State and Local Taxation*, 39 Vand. L. Rev. 1097, 1103 n.9 (1986); *1988 Hearings, infra*, p. 48 at 415, *reprinting "New Software Package is Designed to Help Dm'ers Deal with Use Tax"*, DM News, Dec. 1, 1987, at 18, 22. *See also* Defendant's Reply Brief, Apr. 30, 1990, Ex. 42, which sets forth a description of various use tax compliance systems; and Amicus Curiae Brief of the States of Connecticut, Tennessee, California, et al, App. D at 45a.

[11] Contrary to the suggestion (Brief of Amicus Curiae Direct Marketing Association ("DMA Br.") at 20) that tracking exemptions will stump the computer programs described here, Vertex notes that it is "in the final development" of such an update to its software. *See* DMA Br. App. 4, Quest. 12. AVP Systems presently offers such a product. *See* AVP Systems, "The Sales Tax Beacon," Insert (Autumn 1991). Of course, to the extent that any particular tax compliance product for direct marketers does not presently exist, it is likely because the demand for it has not existed.

Note, *Collecting the Use Tax on Mail-Order Sales*, 79 Geo. L. J., 535, 552 n.102 (1991).

The direct marketing industry is aware of the capabilities of such computer technology. "The database plays a vital role in direct marketing, from customer acquisition through the creative process, then the customer transaction and fulfillment, and finally analysis." Deloitte & Touche, *supra*, p. 9 at 15. Direct marketers have amassed "significantly more customer data" as storage costs have decreased.[12] *Id.* at 21. Recent improvements in the price and performance of smaller, less expensive machines have changed the way even the smallest companies do business. According to an article in a leading direct marketing publication, now "[a]nyone can afford to be a database marketer and do the same things that

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[12] Since 1967 the cost of computing has fallen exponentially. According to Brookings Institution economist Kenneth Flamm, between 1957 and 1978, the inflation-adjusted price/performance ratio – the amount in real terms that a consumer must spend to do a given computing task – decreased at an average of 28% per year (or 20% non-inflation-adjusted per year). Flamm, *Targeting the Computer* 25 (1987). A recent Bureau of Labor Statistics study indicates that such price declines have continued. *See* Sinclair and Catron, *An Experimental Price Index For the Computer Industry*, Monthly Lab. Rev., Oct. 1990, at 21, Table 2.

As of 1980, computer memory capacity cost 40 times less than it did in 1970. *See* J. Cortada, *Historical Dictionary of Data Processing* 114 (1987). In any event, an 80 megabyte computer system can be purchased today for less than $1500. That amount of memory is more than sufficient to operate the computerized sales and use tax compliance programs currently available.

[American Express] and other database marketers do, and do it without mainframes and at hundreds times less the cost." Stacey, "The Microprocessor Revolution," 53 *Direct Marketing Magazine* 10, Feb. 1991, at 65.[13] The industry has, at times, acknowledged as much. *See 1988 Hearings, infra,* p. 48 at 243 (testimony of William T. End, Executive Vice President of L.L. Bean, Inc.) (conceding that "I think the computer side of this . . . is irrelevant. . . . [A] small company can handle the computer part of it if it is made simple.")[14]

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[13] A DMA-commissioned study indicates that over 50% of small direct marketing companies, those with less than $10 million in annual sales, presently use minicomputers. Deloitte & Touche, *supra,* p. 9 at 14. Forty-six percent of consumer catalog companies use the larger and more powerful mainframe computers. Forty-three percent use a combination of mainframes and "end-user" data processing. DMA Stat. Book at 268. Almost 65% of direct marketing companies use a computerized inventory system to provide customers with immediate information on item availability. *See id.* at 89. A 1989 DMA survey revealed that only 3.9% of direct marketing companies do not control any end-user applications with personal computers. *Id.* at 274.

[14] The DMA Brief is itself an example of the ease with which computerized systems can quickly compile large amounts of use tax information. The brief extensively relies upon Vertex for a wide range of current use tax data. *See* DMA Br. App. 2, 3. If DMA can accumulate use tax information for the purposes of a brief, it can certainly centralize this information and make it available for the benefit of its members' compliance with collection requirements. DMA could, for example, establish an 800 number where members or their customers could call to get amounts of tax calculated by computer. DMA already provides centralized services to its members. *See* DMA Br. at 23 n.29.

In any case, computer technology also enables both Vertex and AVP to provide even the smallest direct marketers with the manual counterpart of the computer software. Nationwide tax rate manuals, updated monthly, are available for a fraction of the cost of a computerized compliance system.

Quill claims that direct marketers could have use tax collection duties in approximately 6,500 state and local jurisdictions.[15] However, a nationwide mail order business would not be required to file 6,500 separate use tax returns per reporting period. A more accurate number of the jurisdictions in which a mail order company may have to file a return (effective July 1, 1992) is 192.[16]

While the maximum potential administrative cost of filing returns in 192 jurisdictions is not to be ignored or unduly minimized, that potential burden is not unmanageable.

The industry's description of the chaos that may result from customer calculation of tax rates fails to take into account the nature of most direct marketing transactions. The increasing use of credit cards by customers for mail-order purchases alleviates the collection costs

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[15] The number of jurisdictions in the United States levying sales and use taxes is variously cited as "approximately 6500 jurisdictions" (Pet. Br. at 36); "45 states (plus the District of Columbia) *and* over 6,100 local governments" (DMA Br. at 16).

[16] *See* DMA Br., App. 3 at 1, setting forth selected responses to questions posed to Vertex, Inc. by the Multistate Tax Commission.

that accompany customers' errors or omissions when payments are made by check or money order.[17]

Finally, a number of states have enacted legislation to lessen whatever collection burdens do exist. Thus, several states exempt small direct marketers from collecting any use tax,[18] provide uniform rates for state and local use tax collection,[19] or include collection allowance provisions.[20]

Direct mail companies with in-state branches have long complied with nationwide use tax requirements. Their experience demonstrates that the rest of the direct marketing industry would be able to comply as well.

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[17] Note, *Collecting the Use Tax on Mail-Order Sales*, 79 Geo. L.J. 535, 552 n.103 (1991). When a customer makes a purchase on credit, the mail order vendor need not rely on the customer's tax calculation but can itself calculate the tax and charge the customer's account. *Id.* Approximately 53% of all catalog purchases are paid by either credit card or house credit. DMA Stat. Book at 81. In addition, a significant number of catalog companies offer a toll-free number for ordering or for customer service, *id.* at 94, and could calculate tax rates over the phone for customers preferring to pay by check.

[18] *See, e.g.*, Fla. Stat. § 212.0596(G) (Supp. 1990); Minn. Stat. Ann. § 297A.21(4)(c) (West Supp. 1991); Mo. Ann. Stat. § 144.605(14)(a) (Vernon Supp. 1991); N.Y. Tax Law § 1101(8)(iv) (McKinney Supp. 1991); Wash. Admin. Code § 458-20-221(2)(c) (1989).

[19] *See, e.g.*, Tenn. Code. Ann. § 67-6-702(f) (1989); Wash. Admin. Code § 458-20-221 (1989).

[20] *See* ACIR, State and Local Taxation of Out-of-State Mail Order Sales (A-105), Apr. 1986, Table 2-6, at 44.

V. QUILL'S ACTIVITIES IN NORTH DAKOTA WERE SUFFICIENT TO SATISFY THE NEXUS REQUIREMENT OF *BELLAS HESS*.

Quill's contacts with North Dakota exceeded in both type and frequency those presented to the Court in *Bellas Hess*. Assuming the Court concludes that taxing nexus must include a physical contact between an out-of-state direct marketer and a state, that standard is met under the facts in this case.

Quill's connections with the state include its QSL software; its use of telephone, modem, fax, and telex communications with North Dakotans; and its contacts with North Dakota financial institutions to conduct credit checks on its customers. The North Dakota Supreme Court properly relied upon these contacts to find sufficient nexus under *Bellas Hess*. *See also Good's Furniture House, Inc. v. Iowa Bd. of Tax Review*, 382 N.W.2d 145 (Iowa), *cert. denied*, 479 U.S. 817 (1986) (approving the imposition of a use tax collection responsibility based upon the out-of-state marketers' use of television advertising followed by merchandise delivery in their own trucks).

Quill owns property that is physically present in North Dakota. Quill licenses its QSL software to North Dakota customers. As part of its license agreement, Quill retains title to the floppy diskettes necessary to operate the QSL program. Those floppy diskettes are sent to and retained by QSL customers, including its North Dakota customers. T.C. Response, Ex. I at 20-21, Ex. F at 8-9 and Ex. A attached thereto.

Under the physical presence test Quill espouses, the existence of one piece of physical property in the state, even one floppy diskette, is sufficient to establish nexus. *See also In re Heftel Broadcasting Honolulu, Inc.*, 57 Hawaii 175, 554 P.2d 242 (1976), *cert. denied*, 429 U.S. 1073 (1977) (holding existence of the presence of a film property and a licensing agreement granting telecast rights sufficient to establish taxing nexus). It is questionable whether such a result comports with fundamental fairness. The state concedes that the existence in North Dakota of a few floppy diskettes to which Quill holds title seems a slender thread upon which to base nexus. However, if one piece of property is not sufficient, then a question arises as to what quantity or quality of physical property within a state is necessary for nexus to exist. If so, the purported "bright line" status of the physical presence test disappears.

Quill's computer modem/telephone line connection with its North Dakota customers presents another type of contact that was not before the Court in *Bellas Hess*. Unlike Bellas Hess, Quill does not conduct its business with North Dakota residents merely through the use of the United States Postal Service and common carriers. Quill maintains a telephone bank of 95 persons for the receipt of orders. It solicits customers by telephone, takes orders by fax, telex, and telephone, and allows its customers to check its inventory and prices and order through computer modem.

These activities within North Dakota may constitute sufficient nexus for taxing purposes. In an analogous case the Court found sufficient nexus to tax a telephone call when the call either originated or terminated in the state

and was billed or paid for from an address within the state. *Goldberg*, 488 U.S. at 252. Quill conducted similar activities in North Dakota.

Quill's contacts with North Dakota were also much more frequent than the contacts in *Bellas Hess*. There Bellas Hess mailed two catalogs per year (and occasional flyers) to its Illinois customers; Quill mailed 62 different bulk mailings to its North Dakota customers during one 12-month period.

Based upon Quill's varied and frequent contacts with North Dakota, the North Dakota Supreme Court properly concluded that, under applicable due process and commerce clause principles, Quill had nexus with North Dakota sufficient to justify imposition of the purely administrative duty of collecting and remitting the state's use tax.[21]

VI. THE CONSTITUTIONAL QUESTION PRESENTED SHOULD BE RESOLVED BY THIS COURT AND NOT DEFERRED TO CONGRESS.

Quill and its amici urge the Court to defer to Congress. They argue that if any taxing nexus test other than the physical presence standard they claim *Bellas Hess*

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[21] The North Dakota Supreme Court has reserved the question as to whether Quill's retention of title and risk of loss to the goods it sent to its North Dakota customers constituted sufficient nexus under the physical presence test under North Dakota's version of the Uniform Commercial Code (N.D. Cent. Code §§ 41-02-43(1)(a) and 41-02-44(1)). *See* Pet.App. A30-A31. See also the Brief Amicus Curiae for State of New Mexico for a discussion of this argument.

established is to be articulated, that standard should be set by Congress and not this Court. *See* Pet. Br. at 46-49; DMA Br. at 4. It is disingenuous for the direct marketing industry to make this assertion when it has argued to Congress that Congress lacks power to pass legislation revising or limiting *Bellas Hess*. *See Interstate Sales Tax Collection Act of 1987 and the Equity in Interstate Competition Act of 1987: Hearings on H.R. 1242, H.R. 1891, and H.R. 3521 before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 100th Cong., 2d Sess. 74-79 (1988) ("*1988 Hearings*") (prepared statement of Lucas A. Powe, Jr., on behalf of the Direct Marketing Association and Magazine Publishers Association); *Collection of State Sales and Use Taxes by Out-of-State Vendors, Hearing on S. 639 and S. 1099 before the Subcomm. on Taxation and Debt Management of the Senate Comm. on Finance and Taxation*, 100th Cong., 1st Sess. 43-44 (1988) (statement of Lucas A. Powe, Jr., on behalf of the National Marketing Association, Inc., contending that *Bellas Hess* was a due process decision and that Congress may not alter the *Bellas Hess* nexus standards).

This assertion also suggests, incorrectly, that this Court does not have jurisdiction to address the constitutional issues raised in this case. For the reasons stated in Quill's petition and North Dakota's response, this Court should resolve the constitutional question presented.

Should this Court articulate, as North Dakota urges, a nexus standard different from that suggested by Quill, direct marketers will undoubtedly seek congressional protection from additional state use tax collection duties. In a similar situation that arose after the Court decided *Northwestern States Portland Cement Co. v. Minnesota*, 358

U.S. 450 (1959), many large interstate businesses feared that the Court would eliminate entirely any restriction on states' ability to tax interstate transactions. These businesses immediately sought protective legislation, and Congress reacted promptly by enacting Pub.L. 86-272, 73 Stat. 555 (1959) (codified as amended at 15 U.S.C. § 381 (1982)), which prohibits states from imposing a tax on a corporation's net income based solely on solicitation of orders in the state.[22] The direct marketers will likely not be deterred by their own reliance on the due process clause in seeking a congressional reversal of a decision here.

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[22] The legislative history of Pub.L. 86-272 establishes that Congress, even by its adoption of that statute, did not intend to restrict the states from imposing their sales and use taxes on interstate sales. *See* Senate floor remarks of Senator Bush and Senator Bennett:

> "Mr. BUSH. I should like to ask the Senator a question. The question deals with the net income tax on income derived within the State, and so forth. The illustration the Senator from Georgia gave is one of a corporation which does a tremendous business in the State and does not pay any tax. Is it not true that this bill does not in any way inhibit a State from imposing sales taxes, for instance, upon goods sold in the State by a corporation from without the State?
>
> "Mr. BENNETT. This bill does not affect in any way the power of a State to impose sales taxes, property taxes, licenses, any form of tax, except a tax on the income of the foreign corporation."

105 Cong. Rec. 16,362 (1959).

CONCLUSION

For the reasons set forth above, North Dakota respectfully requests the Court affirm the judgment below.

Dated December 26, 1991.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

QUILL CORPORATION,

Petitioner,

v.

**STATE OF NORTH DAKOTA,
by and through its Tax Commissioner,
HEIDI HEITKAMP,**

Respondent.

**On Writ of Certiorari to the
Supreme Court of the State of North Dakota**

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Respondent.

On Writ of Certiorari to the Supreme Court of the State of North Dakota

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REPLY BRIEF

I.

COMPLETE AUTO DOES NOT OVERRULE *BELLAS HESS*

North Dakota directly challenges the continuing validity of this Court's decision in *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), and contends that *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), overruled *Bellas Hess* 15 years ago.[1] Resp. Br. at 10, 15, 17. To the contrary, *Complete Auto* reconfirmed the *Bellas Hess* requirement that an out-of-state business must have "substantial nexus" with a state

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[1] North Dakota acknowledges that the recent amendments to the North Dakota Use Tax Act would be constitutionally deficient if tested in 1967 under the *Bellas Hess* rationale. Brief for Respondent (hereinafter "Resp. Br.") at 10, 15. *See also* Brief for Petitioner (hereinafter "Pet. Br.") at 47 n.45 (the North Dakota legislature also recognized that the 1987 amendments to the North Dakota Use Tax Act when enacted conflicted with *Bellas Hess*).

before a tax obligation may be imposed on that business.[2]

North Dakota asserts that *Bellas Hess* is grounded on an interpretation of the commerce clause that prohibits all state taxation of businesses engaged in interstate commerce.[3] Resp. Br. at 10, 16-17. *Bellas Hess* stated:.

> [i]f the power of Illinois to impose use tax burdens upon [Bellas Hess] were upheld, the resulting impediments upon *the free conduct* of its interstate business would be neither imaginary nor remote . . .
>
> The very purpose of the Commerce Clause was to ensure a *national economy free from such unjustifiable local entanglements*. Under the Constitution, this is a domain where Congress alone has the power of regulation and control.

Bellas Hess, 386 U.S. at 759-60 (emphasis added).

North Dakota argues that this analysis embodies the free trade rule articulated in *Freeman v. Hewit*, 329 U.S. 249 (1946) and *Spector Motor Service Inc. v. O'Connor*, 340 U.S. 602 (1951). Resp.

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[2] North Dakota contends that this Court has never limited tax nexus to localized, intrastate activities physically conducted by the out-of-state vendor within the taxing state. Resp. Br. at 26. North Dakota's contention belies this Court's reasoning in cases preceding and succeeding *Bellas Hess* (Pet. Br. at 15-19, 27-33) which held that out-of-state mail order vendors that did not conduct a localized, intrastate business were not obligated to collect the state's use tax. See, e.g., *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359, 365 (1941) where the Court stated:

> [T]hose [mail order businesses] are not doing business in the state as foreign corporations. Hence, unlike [Sears] they are not receiving benefits from Iowa for which it has the power to exact a price.

Id. (Bracketed material added.)

See also *National Geographic Society v. California Bd. of Equalization*, 430 U.S. 551, 555 (1977):

> [N]ot every out-of-state seller may constitutionally be made liable for payment of the use tax on merchandise sold to purchasers in the [taxing] State.

Id. (Bracketed material added.)

[3] North Dakota restates the issue in *Bellas Hess* to be whether the *use tax* in question was a tax on the "privilege of engaging in interstate commerce." Resp. Br. at 16-17. A use tax is not a "privilege tax." *General Trading Co. v. State Tax Comm'n of Iowa*, 322 U.S. 335, 338 (1944). Quill does not contend in this case that North Dakota may not tax North Dakotans who purchase mail order goods; it only contends that North Dakota lacks jurisdiction to impose that tax obligation on Quill.

Br. at 16-17. In fact, the quoted language restates the universally accepted meaning of the commerce clause. It is the same analysis found in post-*Bellas Hess* and post-*Complete Auto* cases such as *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 328-29 (1977) and *Dennis v. Higgins*, 111 S.Ct. 865, 870-71 (1991).

The antecedents of *Bellas Hess* are not *Freeman* and *Spector* but the line of cases applying a commerce clause analysis to state use taxes. They are *Felt & Tarrant Mfg. Co. v. Gallagher*, 306 U.S. 62 (1939); *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359 (1941); *Nelson v. Montgomery Ward & Co.*, 312 U.S. 373 (1941); *Miller Bros. Co. v. Maryland*, 347 U.S. 340 (1954); and *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960). The Court in *Bellas Hess* quoted from *Freeman* solely for the proposition that "state taxation falling on interstate commerce . . . can only be justified as designed to make such commerce bear a fair share of the cost of the local government whose protection it enjoys." 386 U.S. at 756. The opinion goes on to say that the same principles have been held applicable in determining the power of a state to impose the burden of collecting use taxes upon interstate sales. "Here, too," said the Court, "the Constitution requires 'some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax'. *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344-345; *Scripto, Inc. v. Carson*, 362 U.S. 207, 210-211." *Bellas Hess*, 386 U.S. at 756-57.

In *Bellas Hess* the Court described cases involving a variety of circumstances in which it had upheld the power of a state to impose liability on an out-of-state seller to collect a local use tax on an interstate sale. It then declared: "[T]he Court has never held that a State may impose the duty of use tax collection and payment upon a seller whose only connection with customers in the State is by common carrier or the United States mail." 386 U.S. at 758. Nowhere in the opinion is the tax or the collection liability characterized as a tax on the "privilege" of engaging in interstate commerce, and, therefore, unconstitutional under the holdings of *Spector* and *Freeman*.

North Dakota's historical revisionism also ignores the fact that by 1967 interstate commerce was subjected to state and local property taxes, use taxes, capital stock taxes, and direct net income taxes. In fact, the only state tax not imposed on interstate commerce was, under the *Spector* rule, one for the "privilege" of engaging in interstate commerce — a privilege the court believed was not one a state had the power to deny or tax.[4] But even that "draftsmanship" rule of *Spector* had been narrowed to one of phraseology by 1959 — long before *Bellas Hess* was decided. *See Northwestern States Portland Cement Co. v. Minnesota,* 358 U.S. 450 (1959); *Complete Auto,* 450 U.S. at 284-85, 287 n.14.

In *Complete Auto,* the sole issue was the constitutionality of a "privilege tax", 450 U.S. at 278, imposed on the gross income of Complete Auto from providing transportation services to automobile dealers located in Mississippi.[5] 430 U.S. at 275-76, 287. Complete Auto argued that the services it provided in Mississippi were but one link in the chain of interstate commerce that was previously placed off-limits to state "privilege" taxes in *Spector Motor Service v. O'Connor,* 340 U.S. 602 (1951). This

[4] *See Developments in the Law — Federal Limitations on State Taxation of Interstate Business,* 75 Harv. L.Rev. 953 (March 1962).

[5] Complete Auto operated substantial property located in Mississippi (office, storage yard, maintenance facilities and trucks) and its employees performed a full array of transportation services in the state. Brief of the Appellee at 5-6, 12; Appendix at 4-6, 81-88, *Complete Auto Transit* (O.T. 1976, No. 76-29).

Court quickly recognized that *Spector* did not control the issue in *Complete Auto.*[6]

Complete Auto is entirely consistent with the Court's decision in *Bellas Hess.* In order to sustain a state tax under commerce clause challenge, the first prong of the *Complete Auto* test requires a finding of an "activity with a substantial nexus with the taxing State" and the fourth prong requires that the tax obligation be "fairly related to the services provided by the State" to the taxpayer.[7] *Complete Auto,* 430 U.S. at 279. These tests are not only consistent with *Bellas Hess,* they had been applied by the

[6] First, the *Spector* rule refused to look to the "practical effect of the tax" in question. 430 U.S. at 278. Under the *Spector* rule, a state tax on interstate business labeled as a "privilege" tax would unequivocally be stricken; whereas a tax of identical economic consequence called by a different name might survive a commerce clause attack. Compare *Railway Express Agency v. Virginia,* 347 U.S. 359 (1954) where the Court struck down an "annual license tax" levied on gross receipts for the privilege of doing business in the State of Virginia with *Railway Express Agency v. Virginia,* 358 U.S. 434 (1959) where the same tax was upheld under a new name. *Complete Auto,* 430 U.S. at 284. Second, the *Spector* rule could insulate interstate business from tax, even though the taxpayer physically carried on local business activities within the taxing jurisdiction. Third, the *Spector* rule had in effect been abandoned by the Court in 1959, approximately eighteen years prior to *Complete Auto* by its decision in *Northwestern States Portland Cement Co. v. Minnesota,* 358 U.S. 450 (1959). *See Complete Auto,* 430 U.S. at 285, 287, n.14. The Court in *Northwestern States Portland Cement* applied the same rationale for taxing income derived from interstate business activities that it applied in *Complete Auto:*

> We conclude that net income from the interstate operations of a foreign corporation may be subjected to state taxation provided the levy is not discriminatory and is properly apportioned *to local activities within the taxing State* forming sufficient nexus to support the same.

Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. at 452 (emphasis added). *Cf. Complete Auto,* 430 U.S. at 279 (four prong test).

[7] At page 20, Resp. Br., North Dakota completely misstates the first and fourth prongs of the *Complete Auto* test by asserting that:

> The first and fourth prongs of the *Complete Auto* test are "a minimal connection between the interstate activities and the taxing State, and a rational relationship between the income attributed to the State and the intrastate values of the enterprise."

Compare Resp. Br. at 20-21 *with* Reply Br. text accompanying this n.7 and *Complete Auto,* 430 U.S. at 279.

Court in sales/use tax cases decided before and after *Bellas Hess*.[8]

In each of the cases where this Court found nexus sufficient to sustain the tax on the interstate business in question, the taxpayer conducted localized business activities which included a substantial physical presence with that taxing jurisdiction. Contrary to North Dakota's assertion, this Court has never intimated in any of its decisions that *Complete Auto* eliminated the constitutional requirement (determinative in *Bellas Hess*) that there be a substantial localized activity conducted within the state by the mail order vendor before that state has jurisdiction to impose a tax on the out-of-state business.[9] Additionally, any

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[8] *See* Pet. Br. at 15-19 and 27-34. The Court also applied these standards in 1959 when it upheld state taxation of income derived from interstate businesses that maintained offices and employees within the taxing jurisdictions. *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 454 (1959) (maintained a large office, salesmen, employees, and automobiles in Minnesota); *Williams v. Stockham Valves and Fittings*, 358 U.S. 450, 455-56 (1959) (maintained an office, equipment and employees in Georgia); *Brown Forman Distilleries v. Collector of Revenue*, 101 So.2d 70 (1958), *cert. denied*, 359 U.S. 28 (1959) (salesmen/"missionary men" in Louisiana); *International Shoe v. Fontenot*, 107 So.2d 640 (1958), *cert. denied*, 359 U.S. 28 (1959) (fifteen salesmen in Louisiana).

[9] See *Goldberg v. Sweet*, 488 U.S. 252 (1989) (where the taxing state had substantial nexus over the taxpayers, the tax collecting agent and the telecommunications reached by the tax), *D.H. Holmes Co. v. McNamara*, 486 U.S. 24 (1988) (taxpayer owned and operated 13 department stores that employed about 5,000 workers in the taxing state), *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981) (taxpayer conducted substantial mining activities in the state) and *National Geographic Society v. California Bd. of Equalization*, 430 U.S. 551 (1977) (taxpayer maintained offices and employees in the state) discussed in Pet. Br. at 15-16 n.6, 27-33.

For cases where taxpayers' activities did not create a substantial nexus with the taxing state, see *Miller Bros. Co. v. Maryland*, 347 U.S. 340 (1954); *Bloomingdale's By Mail, Ltd. v. Commonwealth of Pennsylvania*, 567 A.2d 773 (Pa. Commw. 1989), *aff'd per curiam*, 591 A.2d 1047 (Pa. 1991), *cert. applied for sub nom. Penn. v. Bloomingdale's By Mail, Ltd.*, No. 91-383; *SFA Folio Collections, Inc. v. Bannon*, 585 A.2d 666 (1991), *cert. denied*, 111 S.Ct. 2839 (1991); *Cally Curtis Co. v. Groppo*, 572 A.2d 302 (Conn.), *cert. denied*, 111 S.Ct. 77 (1990); *L.L. Bean, Inc. v. Commonwealth of Pennsylvania*, 516 A.2d 820 (Pa. Commw. 1986); *Direct Marketing Ass'n v. Bennett*, No. Civ. S-88-1067 (E.D. Cal. July 12, 1991) (1991 U.S. Dist. LEXIS 10736); *Land's End, Inc. v. California Bd. of Equalization*, No. 620135 (San Diego Superior Court, Cal. 1991), *appeal docketed*, No. DO14839 (Cal. App. 4th, July 15, 1991); and *Sturbridge Yankee Workshop Inc. v. California Bd. of Equalization*, No. 512584 (Sacramento Superior Court, Cal. 1991), *appeal docketed*, No. CO11169 (Cal. App.3d, May 30, 1991).

tax imposed has to be fairly related to the services provided by the state to the taxpayer (fourth prong of *Complete Auto*). Compare *Bellas Hess*, 386 U.S. 756-58, 760 with *Complete Auto*, 430 U.S. at 279. North Dakota's contention that the *Bellas Hess* standard has been undermined and overruled by *Complete Auto* defies scrutiny of the applicable authorities.[10]

II.

IN PERSONAM JURISDICTION IS NOT A SUBSTITUTE FOR "SUBSTANTIAL NEXUS"

North Dakota urges that the nexus standard in tax and personal jurisdiction cases is or should be the same. Resp. Br. at 23-25.[11] This attempt to conflate the "substantial nexus" standard used in tax cases and the "minimum contacts" standard used in personal jurisdiction cases ignores the fundamentally different constitutional concerns which they reflect.[12] In *Burger*

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[10] North Dakota's argument also misses the mark because nexus is not at issue in the very cases it cites; whereas in *Bellas Hess* nexus is the only issue. Just as nexus for tax purposes was the issue in *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359 (1941), *Miller Bros. Co. v. Maryland*, 347 U.S. 340 (1954), and *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960); it was not an issue in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) which cites *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), or in *Mobil Oil Corp. v. Commissioner*, 445 U.S. 425 (1980) which cites *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435 (1940) - cases which North Dakota mistakenly argues support its contention that *Bellas Hess* has been rejected by this Court. In each of the cases relied upon by North Dakota, the taxpayer had employees or property in the taxing state. Although tax nexus was not an issue in *Mobil*, the Court cites *Bellas Hess* in support of the principle that before a state may tax income generated in interstate commerce, there must be some "intrastate values of the enterprise" carried on within the state. 445 U.S. at 436-37. Mobil carried on substantial wholesaling and marketing activities in Vermont, reporting an annual Vermont payroll in excess of $230,000 and Vermont property values ranging from $3.9 million to $8.2 million for the years in question. 445 U.S. at 428-29.

[11] North Dakota admits that *Complete Auto's* "substantial nexus" test incorporates both commerce clause and due process clause concerns, Resp. Br. at 20-21, but it then avoids any further discussion of the role of the commerce clause.

[12] North Dakota's reliance on *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) to suggest that the "minimum contacts" analysis for personal jurisdiction should control this case also ignores the role of the commerce clause. While *International Shoe* involved taxes, the unemployment tax in question was immune from commerce clause challenge. Congress had given the states specific authority to impose those taxes on compensation paid to employees performing services within the state. 326 U.S. at 315, 321. Thus, that decision does not address commerce clause concerns.

King Corp. v. Rudzewicz 471 U.S. 462 (1985), the Court explains this difference.

In *Burger King*, the Court considered whether a franchisee could fairly be required to defend a claim by its franchisor in the State of Florida. The Court pointed out that the requirements of the due process clause in personal jurisdiction cases are "a function of the individual liberty interest preserved by the Due Process Clause". 471 U.S. at 472, n.13. However, due process clause requirements do not address "federalism concerns" . *Id. See also Insurance Company of Ireland, Ltd. v. Compagnie des Bauxites de Guinee,* 456 U.S. 694, 702-703 n.10 (1982). Federalism concerns are, of course, at the heart of commerce clause requirements which limit state taxation of interstate businesses.

It was precisely "federalism" concerns which the Court highlighted in *Bellas Hess*, that to permit Illinois and other states to tax Bellas Hess would entangle the company in:

> a virtual welter of complicated obligations to local jurisdictions with no legitimate claim to impose "a fair share of the cost of local government."
>
> The very purpose of the Commerce Clause was to insure a national economy free from such unjustifiable local entanglements.

Bellas Hess, 386 U.S. at 760.

The adoption of a "minimum contacts" test in personal jurisdiction cases and a "substantial nexus" test in commerce clause cases reflects more than a mere difference in terminology.[13] *In personam* jurisdiction balances the interests of claimants and out-of-state defendants with respect to the forum in which their controversy will be determined. It generally does not affect substantive rights or obligations. The appropriateness of the limitations placed on such jurisdiction takes into account the

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[13] In *Bellas Hess*, the Court rejected Illinois' argument that the due process standards for personal jurisdiction and tax jurisdiction were similar and refused to apply *McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957) — which involved a classic mail order insurance operation where the company had no physical contacts with the state except solicitations by mail — as the standard to determine tax nexus. Brief of Appellee at 32-34, *Bellas Hess* (O.T. 1966, No. 241). In *McGee*, the Court upheld the state court's *in personam* jurisdiction over the insurance company, ruling that physical presence was not required by the due process clause for adjudicatory jurisdiction.

North Dakota's contention that adjudicatory and tax jurisdiction standards are similar falters considering that neither the majority nor dissenting opinions applied *McGee* to determine the tax obligations of *Bellas Hess*.

extent of the burden on defendants in defending a lawsuit at a location distant from residence or principal place of business, entailing the inconvenience of transporting documents and witnesses over a considerable distance. In balancing those burdens with the burdens imposed on claimants bringing suit in a foreign jurisdiction, the Court looks to whether "the maintenance of the suit" would "offend traditional notions of fair play and substantial justice." *International Shoe,* 326 U.S. at 316.

The commerce clause requires a different analysis of the tax burden from that which North Dakota, its sister states and local taxing bodies would place on out-of-state vendors having no contacts with customers in the taxing state other than by electronic communication, U.S. mail or common carrier. Tax jurisdiction entails burdens of complying with the tax laws of the state.[14] A multitude of affirmative obligations and liabilities

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[14] The tax burdens imposed on the out-of-state business as part of its obligation to collect a state's use tax, include:

a. The requirement to register under the state's taxing acts and be subject to all tax requirements imposed on "retailers" conducting an in-state business (N.D.C.C. §57-40.2-07(1));
b. The obligation to remit all taxes due even if the customer refuses to pay, requiring the business to either pay the tax out of its own funds or refuse the sale (N.D.C.C. § 57-40.2-07(3));
c. The posting of a substantial bond with the state (N.D.C.C. 57-40.2-07(8));
d. Processing and filing claims for refund of overpaid taxes on behalf of customers erroneously paying tax. (N.D.C.C. §57-40.2-17);
e. Keeping abreast of all changes in the tax law including rate, filing dates, and applicable exemptions involving approximately 6,500 jurisdictions (Pet. Br. at 39);
f. Bearing the substantial burden of informing customers every time the state changes its tax laws, often leaving the business unable to change catalogs and advertising materials that have been printed or previously mailed;
g. Being subject to penalties and interest attributable to customers' late or underpayment of tax (N.D.C.C. § 57-40.2-15(1));
h. Corporate officer and employee liability for taxes, interest and penalties on amounts never remitted by the customer (N.D.C.C. § 57-40.2-15.1);
i. Being subject to audit by the state (N.D.C.C. § 57-40.2-09);
j. Being liable for substantial civil penalties for violations of the state use tax provisions (N.D.C.C. § 57-40.2-10 (revocation of right to make sales in the state); § 57-40.2-16 (lien on property); § 57-40.2-15(4) (criminal penalties)).

See Pet. App. A47-A54.

to the state are created. [15] These greater burdens require a higher level of contact, "a substantial nexus," 430 U.S. at 279, to justify the state's imposition of the burden of tax liability and compliance obligations. North Dakota's blithe dismissal of these burdens, Resp. Br. at 25, ignores the constitutional distinction between *International Shoe* and *Bellas Hess*.

Quill does not have the substantial nexus with North Dakota necessary to justify the obligations which the State wishes to impose. In the absence of these contacts, the commerce clause prohibits North Dakota from imposing tax obligations on Quill.

III.

ADOPTION OF NORTH DAKOTA'S *IN PERSONAM* JURISDICTION STANDARD EFFECTIVELY NEGATES ESSENTIAL COMMERCE CLAUSE RESTRICTIONS

North Dakota's substitution of the *in personam* standard for the *Bellas Hess/Complete Auto* standards, Resp. Br. at 20-23, is a sharp departure from established law which has guided businesses, states and the courts for fifty years.[16] North Dakota's

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[15] A description of the cumulative effect of the tax burdens involved is set out in Amici Brief of New Hampshire, et al. at 18-22 and Amici Brief of American Council for the Blind, et al. at 11. These burdens would be especially severe for small mail order businesses. Amicus Brief of Coalition for Small Direct Marketers at 10-11, 17-20; Amici Brief of Carrot Top Industries, Inc., et al. at 9-11; Amicus Brief of Direct Marketing Association at 16-23; and Amici Brief of American Council for the Blind, et al. at 8-17.

The impact of the North Dakota Supreme Court's ruling extends beyond mail order vendors and impacts publishers, financial organizations and service businesses generally. Amici Brief of Magazine Publishers of America, Inc., et al. at 10-12; Amicus Brief of American Bankers Association, et al. at 8; and Amicus Brief of Tax Executives Institute, Inc. at 18-22.

[16] In the last two terms, this Court has refused to grant certiorari in two cases raising the same issue as *Quill*. *Cally Curtis v. Groppo*, 572 A.2d 302 (Conn. 1990), *cert. denied*, 111 S.Ct. 77 (1990); *SFA Folio Collections, Inc. v. Bannon*, 585 A.2d 666 (Conn. 1991), *cert. denied*, 111 S.Ct. 2839 (1991). Prior to that, this Court has cited with approval *Bellas Hess* on at least six occasions, most recently in 1989; lower state and federal courts have referred to *Bellas Hess* in approximately 70 cases, most recently in 1991. *See* Pet. Br. at 27-33, App. 4 to Pet. Br. at 26a-29a, and Pet. App. A76-A81.

position could lead to an abyss of uncertainty in the law that would in all likelihood generate unnecessary litigation.[17]

North Dakota's administrative rule of "three mailings" extends North Dakota's tax jurisdiction to Quill and others; in other states, one sale satisfies the same standard adopted by the North Dakota statute.[18] The test urged by North Dakota, Resp. Br. at 20-23 extends a state's taxing jurisdiction to interstate businesses that have no presence in the state, under the pretext that the interstate business benefits from the services the state is providing to its own residents. Resp. Br. at 33. Under North Dakota's test *no* service of any kind would ever have to be provided to the interstate business. North Dakota makes no effort to define the true limits of its proposed test and, in fact, no standard is created. Whether three solicitations or a single sale, abandonment of the *Bellas Hess* standard will eliminate essential commerce clause protection.[19]

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[17] North Dakota's approach is also inconsistent with *National Geographic*, 430 U.S. 551, where this Court did not adopt California's "slightest presence" test, stating:

> [N]ot every out-of-state seller may constitutionally be made liable for payment of the use tax on merchandise sold to purchasers in the [taxing] state.

National Geographic, 430 U.S. at 555, discussed in Pet. Br. at 28.

[18] See, for example, Brief Amicus Curiae State of New Jersey at 1 and Brief Amicus Curiae State of New Mexico at 4-5, where one sale into those states is sufficient to impose tax liabilities on the out-of-state vendor.

[19] North Dakota urges reversal of *Bellas Hess* in order to restore a competitive advantage to North Dakota retailers who are obligated to pay North Dakota sales tax as a result of their intrastate activities. Resp. Br. at 6-7, 18; R. 211-27. There is a dearth of evidence to support North Dakota's suggestion, Resp. Br. at 6-7, that consumers purchase merchandise by mail to avoid a state's sales/use tax. *See Collection of State Sales and Use Taxes by Out-of-State Vendors: Hearing on S.639 and S.1099 Before the Subcomm. on Taxation and Debt Management of the Comm. on Finance*, 100th Cong. 2nd Sess. (1987) at 37-38 (colloquy between Sen. Mitchell and Messrs. Baldwin, of the National Ass'n of Tax Administrators, and Hanson, of the Multistate Tax Commission, over the failure of states and retailers to provide any evidence to Congress to substantiate their claims that imposition of sales/use taxes affect consumer purchasing decisions). In fact, the State of North Dakota, which is exempt from state sales/use taxes, purchases products from Quill, presumably "to get the best deal possible." Patrick Spaeth, *State Buys Products From Firm It Is Suing*, Bismarck Tribune, December 24, 1991, at 1A, 12A.

If the historical standard in tax jurisdiction cases is to be abandoned, what will take its place? North Dakota argues that the test should *not* be simply mechanical, or quantitative, or formulary. Resp. Br. at 27. North Dakota would apparently prefer to apply a facts and circumstances test to establish the tax liability of out-of-state vendors. Resp. Br. at 28. What are those minimum contacts that will establish that tax liability? The closest that North Dakota comes to providing an answer or defining a standard is to quote from the language in *Burger King Corp.*, 471 U.S. at 476 (1985), which upholds personal jurisdiction if "a commercial actor's efforts are 'purposefully directed' toward residents of another State." Resp. Br. at 25-26. This is the same standard advanced by Illinois on oral argument in *Bellas Hess*:

> Mr. MacCarthy: . . . I think there should be some kind of a rule they [businessmen] should understand. And the rule that I would suggest be distilled from the cases of this Court is a rule which businessmen should well understand, and that is simply where a business is successfully in a state from a business point of view that that should be equated with presence from a legal point of view.

Transcript of Oral Argument at 33, *Bellas Hess*, 386 U.S. 753 (O.T. 1966 No. 241), reproduced in Pet. Br., App. 1 at 6a.

North Dakota advances to this Court the same theory rejected in *Bellas Hess*. North Dakota's proposal seeks to measure state taxing jurisdiction not against current tax jurisprudence but rather against each state's subjective assessment of what is "fair and just."[20] North Dakota's proposed standard amounts to a "facts and circumstances" approach that would guarantee uncertainty over the issue of a state's authority to tax out-of-state businesses that derive an alleged and amorphous "economic benefit" but do not conduct business activities in the state in the traditional sense. North Dakota makes no effort to explain the limits of its proposed new test.

The jurisdictional tests advanced by North Dakota, Resp. Br. at 23-28, will in all likelihood lead to unnecessary litigation to resolve the inevitable confusion that would be created in the

[20] Will advertising in a national magazine create tax jurisdiction in every state in which the magazine is circulated? See *Keeton v. Hustler Magazine, Inc.* 465 U.S. 770 (1984) and *Calder v. Jones*, 465 U.S. 783 (1984), where an author (in *Calder*) and a publisher (in *Hustler*) of articles appearing in national magazines were subject to libel actions in states where the magazines were circulated.

business community, state tax administration and the courts if a reliable and predictable standard is replaced with a subjective "totality of the circumstances" test.[21]

IV.

NORTH DAKOTA DOES NOT PROVIDE SERVICES TO QUILL

At pages 31-35 of its brief, North Dakota attempts to respond to the concerns of the trial judge who explicitly asked: What services were provided by North Dakota to Quill?[22]

The litany of services that North Dakota recites to this Court covers the gamut of all services provided by North Dakota to its residents. Resp. Br. at 33-34. North Dakota argues that Quill receives the benefit of all these services because it is doing business in North Dakota. This argument assumes the answer. The trial court did not find any fact which would establish that Quill does business in North Dakota. In fact, it found to the contrary. Pet. App. A40. North Dakota, ignoring the traditional tests for "doing business," comes to its conclusion by relying upon the reasoning contained in the dissent in *Bellas Hess*. 386 U.S. at 762-63.

Stripped to the bone, North Dakota's argument is quite simply that because Quill solicits North Dakota residents on a regular basis, it is "carrying on a business" in North Dakota. Having so argued, North Dakota can point to nothing in the record to distinguish Quill from Bellas Hess. Pet. Br. at 17-34.

[21] *Cf. Burnham v. Superior Court of California*, 110 S.Ct. 2105, 2117 (1990) (where Justice Scalia eschewed the "totality of the circumstances" test because it did not establish a rule of law but, instead, fostered uncertainty and litigation).

[22] The trial judge stated:

> Rather than dwell on the intricacies of title passing as the State has done in this case, they should have been presenting facts to the Court showing that the State of North Dakota spends funds for the protection and benefit of the mail order business. By doing so, they could show that taxation was not only for the benefit of local residents, but for the benefit of the mail order houses. . . . The focus must be on the beneficiary of the taxes as opposed to the consequences. Until this can be established, it would appear that the tax dollars spent protects the local resident and does not benefit the out of state mail order business in any significant manner.

Pet. App. A41, *North Dakota v. Quill*, (Dist. Ct. Mem. Op.).

In reviewing the record herein, the trial court found that "In *Hess*, the facts are very similar to those found in this case". Pet. App. A40. It is not disputed that the services allegedly provided by North Dakota to Quill were similar to the services allegedly provided by Illinois to Bellas Hess. It is not disputed that Illinois' activities in *Bellas Hess* resulted in the maintenance of a market among Illinois residents comparable to that in North Dakota. North Dakota's argument is reduced to the proposition that since a state confers benefits upon persons within its borders, it indirectly confers benefits upon anyone outside of those borders who solicits those residents, and that those "indirect" benefits are sufficient to sustain an extraterritorial tax obligation on the out-of-state vendor. This is precisely the argument considered and rejected in *Bellas Hess*. 386 U.S. at 760 (Fortas, J., dissenting). In *Bellas Hess*, it was pointed out to this Court that acceptance of Illinois' "economic benefit" argument would have the following results:

> Upon this theory Massachusetts could tax Florida hotels because the prosperity it bestows upon Massachusetts residents enables them to visit those resorts. Minnesota could tax Michigan factories because her farmers are a market for Michigan tractors and cars. Idaho could reach out and tax the seller of gasoline in Utah where the property was to be brought into Idaho following the purchase. It was to prevent just such mutual aggressions and economic retaliation that the States entered into the federal union.

Reply Brief for Appellant at 8-9, *Bellas Hess*, 386 U.S. 753 (O.T. 1966, No. 241).

The lower court's question — What services has North Dakota performed for Quill? — remains unanswered by North Dakota. Based upon the record herein the answer is none!

V.

NORTH DAKOTA HAS MISSTATED MATERIAL FACTS

North Dakota misstates the record when it repeatedly alleges that "unlike Bellas Hess, Quill owned property [QSL diskettes] physically present in [North Dakota]." Resp. Br. at 15; *see also* Resp. Br. at 13, 30, 45, 46. The Record does not support the State's contention.

The gravamen of the North Dakota complaint against Quill under its "economic benefits" theory is that Quill sells merchandise "using state-of-the-art marketing techniques, including a software program" that permits Quill customers to order merchandise by telephone and to communicate with other Quill customers about Quill products. Respondent's Brief in Opposition to the Petition for Writ of Certiorari at 2; *see North Dakota v. Quill*, Pet. App. A29; Resp. Br. at 5, 33, 45-46.

QSL (also known as Quill Service Link) is a software program[23] with a retail value of $15 each that Quill sells or occasionally gives at no charge to customers who purchase computers. (R. 130, 231, 243 — separately bound; J.A. 47). Quill sold or gave QSL to six customers in North Dakota (R. 123), only one of whom has ever used it to order merchandise from Quill (R. 123).

The Record does not support North Dakota's contention that Quill "retains title" to QSL while the diskettes are in the customer's possession (Resp. Br. at 5, 45) or that Quill retains any physical control over QSL or the diskette after sale or gift of the diskette to the customer. (R. 231; J.A. 31, 47.) The intangible right that Quill has under the software agreement to terminate access for inappropriate use of the program is distinct from the customer's ownership and use of QSL.[24] That intangible right is indistinguishable from the protections offered under trademark, trade name, copyright and patent laws. Bellas Hess clearly retained comparable intangible rights in its catalogs and advertising flyers distributed in Illinois and had an even larger intangible interest in accounts receivable owed by Illinois

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[23] QSL allows the customer to keep a diary of activities, keep track of its own inventory (not Quill's inventory as alleged by Respondent, Resp. Br. at 5, 30, 46), order merchandise from Quill, and place messages on the "electronic bulletin board" maintained on a Quill micro-computer located in Illinois to which other QSL customers have telephone access. (R. 247-77.) QSL users are prohibited from unauthorized copying, commercial advertising or publishing of any profane, abusive or offensive language on the "electronic bulletin board". (R. 273, 280.) A QSL user who would violate the rules established for use of the "electronic bulletin board" loses its access privilege, i.e., its access code is deleted from Quill's computer memory. (R. 231, 273, 280; J.A. 47.)

[24] The QSL software agreement is reproduced in the Appendix to the Reply Brief and is included in the Record at R. 246 and 249.

customers.[25] Any right that Quill has under the software agreement has no connection with North Dakota; the agreement specifically provides that any dispute between Quill and the customer will be governed by the laws and courts of Illinois. (App. to Reply Br.; R. 246.)

North Dakota erroneously states that Bellas Hess did not conduct its business with Illinois residents by telephone. Resp. Br. at 46. The record in *Bellas Hess* clearly establishes that Bellas Hess sold merchandise by telephone from its facilities in Missouri.[26]

North Dakota contends that Quill has a meaningful "presence" in North Dakota by communicating with customers by telephone but the Record establishes that Quill does not have any telephone listing, toll-free telephone line, "800" number or WATS line in North Dakota (R. 88; J.A. 32) and that Quill does not solicit by means of any communication system owned by Quill and located in North Dakota (R. 100, 101-02; J.A. 31-32). North Dakota's reference to "Quill's computer modem/telephone line connection with its North Dakota customers" (Resp. Br. 45; *see also* Resp. Br. at 13 and 46), is to property and equipment that Quill owns and operates only in Illinois. (R. 270, 273; J.A. 47.) Quill does not own, control or have an interest in any computer modem located in North Dakota. (R. 232; J.A. 47.)

Quill conducts no business in North Dakota except by United States mail, telephone and common carrier. (R. 87-90, 231-32; J.A. 29-33 and 44-48; Pet. App. A39, *North Dakota v. Quill* (Dist. Ct.

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[25] North Dakota's reliance (Resp. Br. 46) on *In re Heftel Broadcasting Honolulu, Inc.*, 554 P.2d 242 (Hawaii 1976), *cert. denied*, 429 U.S. 1073 (1977) is misplaced. *Heftel* held that CBS was subject to the Hawaii gross income tax on income it earned by leasing 104 films of the TV series *Wild Wild West* to a local TV station. CBS retained ownership and control over all films while they were used by the TV station in Hawaii. Under CBS' agreement the station was obligated to preserve and safeguard each film and return it to CBS in the same condition within 24 hours after broadcast. In the event of damage to any film, the TV station was obligated to reimburse CBS for the costs of making a new print. The films constituted substantial tangible property located in Hawaii and thereby subjected CBS to tax in that state. 554 P.2d at 245-48.

[26] Record on Appeal, National Bellas Hess 1967 Catalog, Spring and Summer Ed. (O.T. 1966, No. 241); Affidavit of Thomas Curry (former Vice President of Marketing with Bellas Hess) at J.A. 49, *Quill* Record on Appeal at R. 234-35, and National Bellas Hess Catalog, attached as Ex. I-2 (R. 235 — separately bound).

Mem. Op.). The Record does not support North Dakota's factual allegations to the contrary.

VI.

STARE DECISIS IS PARTICULARLY APPOSITE

North Dakota asks this Court to overrule a construction of the commerce clause that is based on fifty years of case law. Resp. Br. at 17. North Dakota totally ignores *stare decisis* considerations and dismisses the legitimate concern of "retroactive application" in a footnote, Resp. Br. at 35-36 n.9, with respect to that reversal. Resp. Br. at 17, 47.

This Court has repeatedly recognized that the doctrine of *stare decisis* is of fundamental importance to the rule of law, promoting stability, predictability and respect for judicial authority. *Hilton v. South Carolina Public R. Comm'n*, 60 U.S.L.W. 4056, 4057 (U.S. Dec. 16, 1991) (No. 90-848); *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986). The Court attempts to balance these continuing needs with society's changing fabric.

Quill submits that in this case the policies in favor of following *stare decisis* far outweigh those supporting departure. The principles of *Bellas Hess* were well reasoned in 1967 and provide a certain and workable framework relied upon by taxpayers and lower courts for over twenty-five years.[27] Because *Bellas Hess* involved a judicial interpretation of the commerce clause, Congress may correct through legislative action any misapplication it perceives.[28]

In fact, Congress is fully aware of the *Bellas Hess* decision and over the years it has refused to enact legislation urged by

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[27] Pet. Br. at 27-33, App. 4 at 26a-29a; Pet. App. A76-A81; Amici Brief of National Association of Manufacturers, et al. at 14-19; Amici Brief of Arizona Mail Order Company, Inc., et al. at 7-11.

[28] The Advisory Commission on Intergovernmental Relations (ACIR), a non-partisan congressionally authorized body, examined the issue of state and local taxation of mail order sales. Recognizing the significance of several issues, especially that litigation has no possibility of addressing the various administrative problems concerning tax compliance, the ACIR recommended legislative rather than judicial revision of the *Bellas Hess* standard:

> In the judgment of the majority of the Commission, only carefully crafted Congressional action can both negate the *National Bellas Hess* decision and achieve a delicate — but essential — balance.

ACIR Report, *State and Local Taxation of Out-of-State Mail Order Sales* (A-105) (April, 1986) at 18.

the states to alter the decision or its effect.[29] The fact that the *Bellas Hess* decision has been considered but not changed by Congress and that it has been consistently relied upon by taxpayers and numerous lower courts in determining taxable nexus raises "to their acme" the considerations in favor of applying *stare decisis* herein.[30] *See Payne v. Tennessee*, 111 S.Ct. 2597, 2610 (1991). Additionally, abandonment of *Bellas Hess* would likely result in state claims for billions of dollars of uncollected use taxes allegedly justified by anti-*Bellas Hess* statutes enacted as long ago as 1986.[31]

North Dakota advances no "compelling justification" for urging the Court to depart from the doctrine of *stare decisis*.[32] Its major premise is that "things have changed" and therefore the law must also change. In its enthusiasm to support the State's fisc, the North Dakota Supreme Court fails to see that the *Bellas Hess* decision is more analogous to a statutory standard and should only be altered by Congressional action. A lack of such action does not equate to "compelling justification." *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984).

VII.
REAFFIRMATION OF *BELLAS HESS*

The most important practical effect of reaffirming the vitality of *Bellas Hess* will be in all likelihood to galvanize action in Congress to resolve inconsistencies in the application of use taxes nationwide in a manner which avoids undue burdens on interstate commerce while promoting fair and efficient state revenue systems. As the states have become more and more aggressive in asserting taxing power over out-of-state sellers, as

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[29] *See* Pet. Br. at 34-36, 46-49.

[30] For a discussion of the problems that may be created for the mail order industry if *Bellas Hess* is not followed, see Amici Brief of Arizona Mail Order Company, Inc., et al. at 11-20. Adherence to established rules has a beneficial impact on the economy in general and departure from established precedent that affects investment decisions is harmful to a healthy and competitive economy. Amici Brief of National Association of Manufacturers, et al. at 10-12.

[31] *See* Amici Brief of Arizona Mail Order Company, Inc., et al. at 11-20, and App. 1b-3f

[32] Many states, including North Dakota, have alternative means for collecting use taxes from residents. *See* Pet. Br. at 46 and App. 3; Amicus Brief of Direct Marketing Association at 27-28; Amici Brief for New Hampshire, et al. at 23.

illustrated by the behavior of North Dakota's legislature and North Dakota's Supreme Court in this case, there has been less and less pressure for states to compromise their differences in designing Congressional legislation for uniform, simple and efficient measures for collection of use taxes by out-of-state sellers. That solutions can be reached under difficult political circumstances has recently been illustrated by actions of the European Community in establishing rules for cross-border mail order sales within Europe effective January 1, 1993, with respect to their sales taxes, which they call value-added taxes.

Overruling *Bellas Hess* will destroy the interstate marketplace as we now know it. The existing scope of freely flowing commerce among the states will be curtailed by reduced sales to consumers *and*, equally importantly, by reduced sales to business firms. One after the other the *amici* briefs in support of Petitioner illustrate:

1. the increased costs and compliance burdens on sellers which will lead to reduced interstate sales,[33]
2. the reduced availability of goods and supplies to consumers and businesses in rural areas and smaller cities,[34]
3. the likely reduction in the number of sellers and suppliers who through their huge number and wide variety offer customers a conveniently exercisable range of choice that probably exists nowhere else in the world,[35]
4. and a general reduction in marketing efficiency which will be reflected in increased prices and a narrower range of choice in selecting goods by size, shape, color, and design.[36]

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[33] Amicus Brief of Direct Marketing Association at 14-23, 25-27; Amici Brief of Carrot Top Industries, Inc., et al. at 6, 8-13; Amicus Brief of Coalition for Small Direct Marketers at 12-21

[34] Amici Brief of American Council for the Blind, et al. at 11-12.

[35] Amicus Brief of Direct Marketing Association at 15; Amici Brief of Carrot Top Industries, Inc., et al. at 12; Amicus Brief of Coalition for Small Direct Marketers at 17-21; Amici Brief of American Council for the Blind, et al. at 12-13.

[36] Amicus Brief of Direct Marketing Association at 15-16; Amici Brief of American Council for the Blind, et al. at 12-13.

The national market is one of American's most prized possessions and is largely accounted for by this Court's continuing vigilance through its enforcement of the commerce clause. This Court can and does through its administration of this clause assure that the inevitably parochial interests of states acting alone are not allowed to thwart the national economic policy established by the Constitution's commerce clause. That critical power, coupled with Congressional power to regulate commerce among the states, permits the orderly, efficient, and fair evolution of state tax systems.

CONCLUSION

For the reasons set forth in its briefs, Quill respectfully requests this Court to reverse the judgment below.

Respectfully submitted,

January 15, 1992.

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APPENDIX

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

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Petitioner,

v.

STATE OF NORTH DAKOTA,
BY AND THROUGH ITS TAX COMMISSIONER,
HEIDI HEITKAMP,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of North Dakota

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BRIEF OF TAX EXECUTIVES INSTITUTE, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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---

BRIEF OF TAX EXECUTIVES INSTITUTE, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

Pursuant to Rule 37 of the Rules of this Court, Tax Executives Institute, Inc. respectfully submits this brief as *amicus curiae* in support of Petitioner, Quill Corporation.[1] Tax Executives Institute (hereinafter "TEI" or "the Institute") is a voluntary, non-profit association of corporate and other business executives, managers, and administrators who are responsible for the tax affairs of their employers. The Institute was organized in 1944 and curently has approximately 4,600 members who represent more than 2,000 of the leading corporations in the

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[1] Tax Executives Institute has received the written consents of the Petitioner and Respondent to the filing of this brief; those consents have been filed with the Clerk of the Court.

United States and Canada. The members of the Institute represent a cross-section of the business community in North America; nearly all the companies represented by the Institute's membership are engaged in interstate commerce. Substantially all the Institute's members will be directly affected by the resolution of this case, for it implicates the Commerce Clause[2] rights not only of mail-order companies but of all interstate businesses.

Tax Executives Institute is dedicated to promoting the uniform and equitable enforcement of the tax laws throughout the Nation and to reducing the costs and burdens of administration and compliance to the benefit of both the Government and taxpayers. This case involves the continuing vitality of this Court's 1967 Commerce Clause decision in *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967). In that case, the Court held that an interstate business without any physical presence or activities in a given State did not have a sufficient connection or nexus with the State to require the business to collect and remit use taxes on sales made by mail and telephone to customers within the State. By casting aside this Court's decision in *National Bellas Hess*, the North Dakota Supreme Court rejected a long established bright-line test that vindicated the Commerce Clause and simplified tax administration for thousands of business taxpayers and tax administrators.

The Institute is concerned that the breadth of the North Dakota Supreme Court's decision will frustrate the national policies underlying the Commerce Clause and deprive taxpayers of the certainty that *National Bellas Hess* brought to the administration of the Nation's sales and use tax laws and to state taxation generally. If the North Dakota Supreme Court's decision stands, taxpayers throughout the Nation will suffer from the resulting uncertainty and increase in the cost and burden of compliance. As the individuals who must con-

[2] U.S. Const. art. I, § 8, cl. 3.

tend daily with the interpretation and administration of the Nation's tax laws, the Institute's members have a vital interest in the proper disposition of this case.

SUMMARY OF ARGUMENT

The "fundamental purpose of the [Commerce] Clause is to assure that there be free trade among the several States." *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 335 (1977). In tandem with the Due Process Clause of the Fourteenth Amendment[3], the Commerce Clause acts to prevent the States from enacting unfair tax or tax collection statutes and thereby imposing "unreasonable clog[s] upon the mobility of commerce." *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935). *Amicus* Tax Executives Institute is concerned about the scope and the implications of the North Dakota Supreme Court's decision in this case. If not reversed, the decision would undercut the protections afforded taxpayers by the Commerce Clause, both because of the uncertainty it would spawn and because of the disproportionate costs it would impose.

The decision below has significance beyond the borders of North Dakota and far beyond the duty of a large mail-order business to collect use tax on out-of-state orders. It potentially affects the ability of all businesses—no matter how small and no matter where located—to engage in interstate commerce without the imposition of undue burdens. *Amicus* TEI is concerned about the possible expansion of the Supreme Court of North Dakota's spurious reasoning beyond the use tax area—specifically, to the ability of the States to tax income derived from interstate commerce where the only activities of the out-of-state person are the solicitation of orders, notwithstanding the existence of federal legislation limiting such taxation. *See* Pub. L. No. 86-272, 73 Stat. 555 (*codified at* 15 U.S.C. § 381 (1988)). That the North Dakota decision

[3] U.S. Const. amend. XIV, § 1.

implicates more than the States' ability to impose a use tax obligation on mail-order businesses is suggested by the Court's decision to hear the case in tandem with *William Wrigley, Jr. Co. v. Wisconsin Department of Revenue*, 465 N.W.2d 800 (Wis. 1991), *cert. granted*, 60 U.S.L.W. 3257 (U.S. Oct. 7, 1991) (No. 91-119), which involves an interpretation of the federal statute.

In addition, in reaching its decision, the North Dakota court ignored a basic principle of constitutional adjudication: It is this Court that prescribes constitutional standards and the lower courts are obliged to adhere to those standards. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958); *The Mayor v. Cooper*, 73 U.S. (6 Wall.) 247, 253 (1867). The decision below thus stands not only as a repudiation of the bright-line test set forth in *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), but also as an affront to this Court's undeniable and necessary authority to establish governing principles of constitutional jurisprudence and the Congress's rightful power to regulate commerce. *Amicus* TEI respectfully suggests that if *National Bellas Hess* and the quarter century of its judicial progeny are to be jettisoned—if the commercial relationships developed in reliance upon the decision are to be upended—it is for Congress to decide. *See Flood v. Kuhn*, 407 U.S. 258, 283-84 (1972).

"[O]nly Congress has both the ability to canvass the myriad facts and factors relevant to interstate taxation and the power to shape a nationwide system that [will] guarantee the States fair revenues and offer interstate businesses freedom from strangulation by multiple paperwork and tax burdens." *ASARCO, Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307, 331 (1982) (O'Connor, J., with Blackmun & Rehnquist, JJ., dissenting). Congress enacted such legislation in 1959 in respect of the States' ability to impose a net income tax. If the standard enunciated in *National Bellas Hess* is to be abandoned after 25 years, that decision should similarly be made by the national legislature.

The repudiation of the bright-line test established by *National Bellas Hess* would represent a major departure from long-standing principles of Commerce Clause jurisprudence and, if effected at all, should apply on a prospective-only basis. The retroactive application of any decision curtailing the protections afforded by *National Bellas Hess* would work a major hardship on interstate commerce and unjustly reward the States for their massive resistance to this Court's holdings. *Cf. Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971). First, retroactive application would deprive interstate taxpayers of the certainty necessary to conduct their business affairs in an orderly manner by signaling that the Constitution's protections (as articulated by this Court) may be only transitory. *American Trucking Ass'ns v. Smith*, 110 S. Ct. 2323, 2338 (1990) ("[w]hen the Court concludes that a law-changing decision should not be applied retroactively, its decision is usually based on its perception that such application would have a harsh and disruptive effect on those who relied on prior law"). The ensuing uncertainty would undermine the very purpose of the Commerce Clause.

Secondly, retroactively overruling *National Bellas Hess* would send a signal to the States that they have nothing to lose by disregarding this Court's holdings and "rolling the dice" with taxpayers' Commerce Clause rights. *Amicus* TEI believes the opposite signal should be sent: States should be placed on notice that they cannot blithely dismiss this Court's decisions. The decision of the North Dakota court should be reversed.

ARGUMENT

I.

In this case, the North Dakota Supreme Court held that this Court's holding in *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), which limits the States' ability to impose a use tax collection obligation on out-of-state mail-order businesses, is an "obsolescent precedent" that is contrary to "common sense and experience." App. A10.[4] Averring that "[t]he economic, social, and commercial landscape upon which [*National*] *Bellas Hess* was premised no longer exists . . . ," App. A11, the North Dakota court cast aside this Court's holding that the Commerce Clause and Due Process Clause of the United States Constitution require the physical presence of a business in a State before that State can require the business to collect use tax on in-state mail-order sales. *See* U.S. Const. art. I, § 8, cl. 3; U.S. Const. amend. XIV, § 1. *Amicus* Tax Executives Institute believes that the decision of the North Dakota court is deeply flawed and threatens to impose unreasonable costs and burdens on interstate businesses in contravention of the Commerce Clause and Due Process Clause.

A. The Decisional Framework

The "fundamental purpose of the [Commerce] Clause is to assure that there be free trade among the several States." *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 335 (1977). In tandem with the Due Process Clause of the Fourteenth Amendment, the Commerce Clause acts to prevent the states from enacting unfair tax or tax collection statutes and thereby imposing "unreasonable clog[s] upon the mobility of commerce." *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935); *see* Paul J. Hartman, *Federal Limitations on State and Local Taxation* §§ 2.2, 2.3 (1981).

[4] References to "App." are to the appendix filed with Quill Corporation's Petition for a Writ of Certiorari to the Supreme Court of the State of North Dakota.

Because the Commerce Clause was intended to protect "the free flow of trade between the States," "[s]tate taxation falling on interstate commerce . . . can only be justified as designed to make such commerce bear a fair share of the cost of the local government whose protection it enjoys." *Freeman v. Hewit*, 329 U.S. 249, 252, 253 (1946). In determining whether a particular state taxing scheme is constitutionally valid, this Court has held that "due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." *Miller Bros. v. Maryland*, 347 U.S. 340, 344-45 (1954). In *National Bellas Hess*, the Court cited *Miller Bros.* with approval and imported its "definite link, some minimum connection"—or nexus—standard into its Commerce Clause analysis. 386 U.S. at 756, *quoting Miller Bros.*, 347 U.S. at 344-45.

The overarching importance of nexus to Commerce Clause determinations is underscored by the Court's decision in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). In that case, the Court established a four-prong test for determining whether a state tax statute violates the Commerce Clause, holding that such a tax will be sustained only if—

- it is applied to an activity with a substantial nexus with the taxing State,
- it is fairly apportioned,
- it does not discriminate against interstate commerce, and
- it is fairly related to the services provided by the State.

Id. at 279. Thus, *Complete Auto Transit* sets forth a decisional framework for Commerce Clause inquiries that in-

corporates the Due Process nexus test as a threshold requirement and then requires a balancing of competing interests in determining whether the tax infringes on interstate commerce. *See, e.g., Trinova Corp. v. Michigan Dep't of Treasury*, 111 S. Ct. 818, 828-29 (1991); *Exxon Corp. v. Department of Revenue*, 447 U.S. 207, 227-28 (1980). Absent a sufficient connection between the State and the person, property, or transaction to be taxed, however, the "fairness" of the particular levy—whether it is properly apportioned or whether it is reasonably related to the services provided by the State—is irrelevant: it will be struck down as violative of both the Due Process Clause and the Commerce Clause. *See Trinova Corp.*, 111 S. Ct. at 828-29; *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 436-37 (1980).[5]

National Bellas Hess involved the State's power to impose a use tax collection duty on an out-of-state business with respect to sales made to in-state customers through a common carrier or the mails. Although *National Bellas Hess* predates the Court's decision in *Complete Auto Transit*, the earlier decision applied the same nexus standard that governs today: whether "some definite link, some minimum connection, [exists] between a state and the person, property or transaction it seeks to tax." *National Bellas Hess*, 386 U.S. at 756. *See Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 626 (1981) (citing *National Bellas Hess* in support of the statement that the "threshold test" under *Complete Auto Transit* is whether the interstate busines has a substantial nexus with the taxing state); *Goldberg v. Sweet*, 488 U.S. 252, 263 (1989).

In *National Bellas Hess*, this Court considered whether a State could require an out-of-state mail-order business

[5] Similarly, a taxing scheme may be struck down as violating the second, third, or fourth prong of the *Complete Auto Transit* test even if the scheme is premised on a constitutionally sufficient nexus between the State and the person, property, or transaction to be taxed. *See Trinova Corp.*, 111 S. Ct. at 828-29; *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 617 (1981).

to collect the use tax on mail-order sales made to state residents. In striking down the statute under both the Commerce and the Due Process Clauses, the Court focused on whether the business maintained a physical presence within the State:

> [T]he Court has never held that a State may impose the duty of use tax collection and payment upon a seller whose only connection with customers in the State is by common carrier or the United States mail.

386 U.S. at 758. The Court explained that sanctioning the imposition of a use tax collection duty on a business that maintained no physical presence in the state would give rise to "unjustifiable local entanglements" of interstate commerce. *Id.* at 760. The Court reasoned that the administrative and recordkeeping requirements that could arise in the absence of a physical presence test "could entangle National [Bellas Hess's] interstate business in a virtual welter of complicated obligations to local jurisdictions. . . ." *Id.* at 759-60.

B. The Danger of an Open-Ended Standard

In the quarter of a century since this Court decided *National Bellas Hess*, the decision has been cited in more than 75 cases, including 8 decisions by this Court. App. A76-A81. Notwithstanding the long history of adherence to the physical presence test enunciated in *National Bellas Hess*, the North Dakota Supreme Court blithely concluded:

> [T]he concept of nexus encompasses more than mere physical presence within the state, and . . . the determination of nexus should take into consideration all connections between the out-of-state seller and the state, all benefits and opportunities provided by the state, and should stress economic realities rather than artificial benchmarks.

App. A25-A26. The lower court then collapsed the first and fourth prongs of the *Complete Auto Transit* test,

choosing to focus on whether the tax collection duty at issue is "fairly related to the benefits, opportunities, or services provided by the taxing state." App. A27-A28. The court thus incorrectly transformed the independent requirements of substantial nexus (first prong)—a threshold requirement—and fair relation (fourth prong) into a single "balancing" standard that concentrates myopically on the business's "economic presence" in the State.

By short-circuiting its application of *Complete Auto Transit*, the North Dakota court deigned to paint its repudiation of the bright-line test in *National Bellas Hess* as a necessary step in overcoming "the fertile imaginations of attorneys representing mail order interests." App. A11. Such a transmogrification of this Court's precedents, however, is not without its costs. If the physical presence test prescribed in *National Bellas Hess* were supplanted by the North Dakota court's pliable "economic presence" standard, the Commerce Clause rights of interstate businesses would be seriously impaired for two reasons. First, the "economic presence" test is open-ended and without limits; it operates as a one-way street to rationalize taxing schemes, not to vindicate the Commerce Clause rights of interstate businesses. Secondly, the "economic presence" test would impose unreasonable administrative costs and burdens on interstate businesses.

1. *The Price of an Open-Ended "Standard."* The "economic presence" standard propounded by the North Dakota court offers taxpayers and tax administrators no certainty, for it turns on "a review of the totality of the circumstances, on a case-by-case basis, with special emphasis upon the economic realities presented." App. A23. In the absence of certainty, however, the Commerce Clause cannot operate to "ensure a national economy free from such unjustifiable local entanglements." *National Bellas Hess*, 386 U.S. at 760. Rather than serving as a brake on "unreasonable clog[s] on the mobility of commerce," *G.A.F. Seelig, Inc.*, 294 U.S. at 527, the nexus

requirement as interpreted by the States would become little more than the word "glory" in *Through the Looking Glass*: meaning whatever the States, like Humpty Dumpty, say it means.[6]

This unsettling portrait of the "economic presence" test is unfortunately confirmed by a review of the North Dakota court's opinion. The court offered no governing standard, no sense of balance; rather, it adopted the "kitchen sink" approach. In its quest to find "economic presence," the court seized upon a whole variety of undifferentiated "contacts" and "connections" between the Quill Corporation and the State:

- The number of customers the company had in the State, the amount of annual sales, and the number of catalogs and flyers mailed to customers in the state. App. A29.
- The presence of a "help line" for consumers to call (at their own expense) and specialized service representatives to assist with custom printing orders or to answer questions about computers available for sale. App. A29.
- The company's licensing to some of its North Dakota customers of a computer software program, which accorded those customers direct computer access (again at the customer's own expense) to Quill's computer system. The court noted that Quill retained rights to the software and related documentation through the license agreement. App. A29-30.[7]

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[6] Lewis Carroll, *Through the Looking Glass* 186 (Signet Classic 1960 ('"When *I* use a word ['glory']," Humpty Dumpty said, in a rather scornful tone, "it means just what I choose it to mean—neither more nor less."').

[7] The court also stated that "[b]ecause Quill retained ownership rights in its . . . software and accompanying user documentation, Quill received fire and police protection for its property within the State." App. A35.

The court did not seriously endeavor to evaluate the relative importance of these "contacts." Rather, it simply cited them as supporting, somehow, its finding of nexus. As to whether the use tax collection obligation was fairly related to the services provided by North Dakota,[8] the court embraced "an expanding view of the benefits which may support State taxation." App. A31. It argued that imposing use tax collection obligations on Quill and other mail-order businesses was proper because "it is the in-state infrastructure which creates and maintains the consumer market and economic climate that fosters demand for the seller's goods and services." App. A32. The court also noted that Quill had access to the state court system to enforce legal rights against delinquent or fraudulent buyers and was assured of an orderly market through consumer protection and usury laws on mail order transactions. App. A33. Similarly, the court stated that Quill's contacting North Dakota financial institutions to check credit information on customers was furthered by State regulation of the banking industry. App. A35.

Finally, the court invoked the notion of "trash nexus." It asserted that the Commerce Clause provided no protection to Quill because "[the State] disposes of the 24 tons of solid waste contributed annually to North Dakota landfills by Quill's catalogs and flyers." App. A34. The court noted that the Connecticut Supreme Court had rejected such a concept in *SFA Folio Collections, Inc. v. Bannon*, 585 A.2d 666 (Conn.), *cert. denied*, 59 U.S.L.W. 3838 (U.S. 1991), but superciliously characterized the Connecticut court's analysis as "far too simplistic." App. A34.[9]

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[8] As previously stated (*supra* at pages 9-10), the North Dakota court erroneously combined its analysis of the first and fourth prongs of the *Complete Auto Transit* test, jumping to the fourth (fair relation) prong before establishing whether the threshold requirement of substantial nexus had been satisfied.

[9] The Connecticut court had dismissed the trash nexus argument as "without merit," reasoning that "[b]ecause the catalogs are the property of the Connecticut residents, it is axiomatic that it is the resident who is deriving the benefit from the state and who must contribute to the cost of the disposal." *SFA Folio Collections, Inc.*, 585 A.2d at 671 n.6.

As previously suggested, there was no order to the North Dakota court's analysis of the various factors claimed to support its finding of "economic presence." There was no weighing of the factors, no indication that the omission of one or two factors would have defeated the finding of nexus or that the addition of another, unstated factor would have cemented it.

That is the problem with the North Dakota court's "economic presence" standard: it is so amorphous that no matter what a business's "defense" might be to the citation of a particular factor, the State would be free to conjure up another. For example, could the mere licensing of software to residents of a State, without more, subject an out-of-state business to a use tax collection obligation? [10] Could the cashing of a check drawn on an in-state bank, without more, somehow satisfy the Commerce Clause's requirement of "substantial nexus" between a State and an out-of-state business? Would the answer be any different if the out-of-state business engaged in direct solicitation of in-state customers? Or if it engaged in business only through advertisements in general circulation periodicals? Or if its television or radio advertising originated outside the State?

Presumably, the State would respond that none of the aforementioned factors by itself would be enough. Undoubtedly, the North Dakota court would point to the State's statutory definitions of "retailer" and "maintaining a place of business." North Dakota Cent. Code

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[10] The software license in this case is substantially similar to licenses granted in respect of all commercially available software programs; its primary purpose is to restrict the uncompensated duplication of the software, not to preserve the licensor's rights in any tangible property (floppy diskettes and program documentation).

§§ 57-40.2-01(6), (7) (Supp. 1989), *reprinted at* App. A47-A48. The question, however, is not whether the States choose to tax such activity but whether the Constitution permits such a tax. A negative answer to the latter question does not flow inevitably from the North Dakota court's analysis. Indeed, *amicus* TEI submits that as crafted by the North Dakota court, the "economic presence" test is more insidious than the "slightest presence" test that this Court properly rejected in *National Geographic Society v. California Board of Equalization*, 430 U.S. 551, 556 (1977). After all, in *National Geographic* the business had some physical presence in the state, albeit unconnected with the transactions giving rise to the use tax obligation. *See* Jerome J. Hellerstein, *State Taxation I: Corporate Income and Franchise Taxes* ¶ 6.7[2], at 226-27 (1983). Here, there is nothing but "conjured presence" and trumped-up nexus.

Stated simply, abandoning the bright-line test of *National Bellas Hess* could leave the States free to wield "economic presence" as a shibboleth to eviscerate the protections of the Commerce Clause's nexus requirement. The scope and meaning of the term would change from case to case, to suit the needs and wants of the taxing jurisdiction. It would provide no guidance to taxpayers or tax administrators and would guarantee, not the free flow of commerce, but only contention and dispute. Under the North Dakota court's view of the Commerce Clause, the vindication of interstate commerce would depend on self-restraint by the States. There would be no stability in the rules. There would be no predictability. And the basic purposes of the Commerce Clause and Due Process Clause would consequently be undermined.

2. *The Administrative Burdens Spawned by an Open-Ended "Standard."* In *National Bellas Hess*, this Court cited with concern the administrative cost and burdens that would be imposed on mail-order businesses absent a Commerce Clause and Due Process requirement that a

business be physically present in the State seeking to impose a use tax collection obligation. 386 U.S. at 759-60. Noting that "if Illinois can impose such burdens, so can every other State, and so, indeed, can . . . every other political subdivision throughout the Nation with the power to impose sales and use taxes," the Court concluded that "[t]he very purpose of the Commerce Clause was to ensure a national economy free from such unjustifiable local entanglements." *Id.*

The North Dakota court gave short shrift to this Court's well-articulated concerns about the administrative burdens spawned by a wide-open nexus standard, as follows: "The almost universal usage of automated accounting systems, and corresponding advancements in computer technology, have greatly alleviated the administrative burdens created by such a collection duty." App. A26. The court also suggested that any burden on the seller is "alleviate[d]" by the State's permitting the seller to retain a percentage of the use tax as reimbursement for expenses incurred in collecting and remitting the tax. App. A26.

Notwithstanding the North Dakota court's effort to trivialize this Court's concern with the administrative burdens spawned by the imposition of use tax collection obligations, there can be no doubt such burdens can, and do, rise to the level of constitutional significance. Lawrence H. Tribe, *American Constitutional Law* 450 (2d ed. 1988). These burdens are not imaginary or remote: they are real and profuse. When *National Bellas Hess* was decided, there were 2,300 local jurisdictions that could potentially impose obligations on out-of-state businesses. 386 U.S. at 759 n.12. That number now stands at more than 7,000 with a variety of thresholds, rates, exemptions, and varying definitions of the same operative terms. Price Waterhouse, *Study to Estimate the Cost of Collecting State & Local Sales and Use Tax* ES-2 (1990); *see* Advisory Commission on Intergovernmental Relations,

State and Local Taxation of Out-of-State Mail Order Sales 6 (April 1986).[11]

Were that it were true that compliance could be effected by the flip of a computer switch! But it is not true. Hence, the North Dakota court can employ pejorative terms—such as "goliath" (App. A11) and "leviathan" (App. A24)—to describe Quill Corporation, but it cannot evade the reality that most mail-order businesses are not behemoths but small businesses.[12] Does the Constitution distinguish between a business with computer facilities and those without?

Moreover, even if modern technology makes it *possible* to comply with a plethora of state use tax collection obligations, it does not make it *free*. Businesses would have to purchase the necessary computer software, hire personnel to ensure its maintenance, devote catalog space to explaining the obligations to its customers, and establish procedures for handling customer errors (especially where the customer pays by check). Note, *Collecting the Use Tax on Mail-Order Sales*, 79 Geo. L.J. 535, 539-41 (1991)

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[11] The Advisory Commission, which gave a 1986 total of 6,500 jurisdictions, wrote that "[i]n addition to rate differences, exempt items and buyers vary greatly from state to state—a particular problem for sales into states exempting purchase of food or clothing, or to potentially exempt buyers (e.g., charitable organizations in many states [and governmental units]), or to business firms." *Id.* at 6.

[12] Daniel T. White, *Emerging State Use Tax Collection Legislation and the Out-of-State Mail Order Vendor: One Unconstitutional Step Beyond* Scripto *and* National Bellas Hess, 42 Fla. L. Rev. 775, 801 (1990) ("Sound policy reasons support the Court's view that economic presence alone does not create the required nexus. Standards using communicative and incidental contacts do not achieve any marked degree of certainty, one goal of due process. With respect to the commerce clause, compliance with over 6,500 taxing jurisdictions is simply too burdensome for the majority of the mail order industry's members: small mail order vendors.").

(detailed discussion of administrative burdens posed by use tax collection obligation); Laura A. Kulwicki, *State Taxation of Mail Order Sellers: An End to the Nexus Wars?*, 1 State Tax Notes 332, 337-38 (1991) (the North Dakota court "seriously misgauged the nature of the use tax collection obligation and the ability of computers to ease the resulting burdens in collection"). Although the burdens could be tempered if the States and local jurisdictions could agree on a single set of definitions, exemptions, and rates, there is absolutely nothing to suggest any such agreement will be soon forthcoming.

According to a survey conducted by an independent accounting firm, the average mail-order business spends 15 cents for every dollar of use tax collected, with expenses ranging from 25.1 percent of the collected tax (for firms with gross sales of less than $10 million) to 2.4 percent (for firms with gross sales of more than $100 million). Touche Ross, *A Study to Determine the Economic Impact on Mail Order Firms of Multi-State Sales Tax Collection* 5 (1986), *cited in* Note, *supra*, 79 Geo. L.J. at 540 n.36. The 15-percent average cost found in the study is 10 times higher than the credit North Dakota affords as reimbursement for expenses incurred in collecting and remitting the use tax. *See* North Dakota Cent. Code § 57-40.2-07.1 (Supp. 1989), *reprinted at* App. A51. Contrary to the North Dakota court's assertion, such a modest offset scarcely "alleviates" the business's cost. In addition, that cost is more than five times greater than the cost imposed on in-state retailers. *See* Price Waterhouse, *supra*, at III-3 (national average collection cost of 3.48 percent of total sales tax liability).[13]

In summary, this Court's concern about the administrative cost and burdens associated with imposing a use tax collection obligation on out-of-state businesses was valid

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[13] *Accord* Note, *supra*, 79 Geo. L.J. at 541 ("[o]n average mail-order companies bear six or seven times the collection costs of in-state retailers who can collect sales tax at the cash register").

in 1967, and it remains valid today. The "virtual welter of complicated obligations to local jurisdictions," 386 U.S. at 760, has not abated but, rather, has intensified. It remains a matter of constitutional significance and cannot be ignored.

II.

The North Dakota court's decision has significance beyond the borders of North Dakota and far beyond the duty of a large mail-order business to collect use tax on out-of-state orders. The expansive nexus standard propounded by the North Dakota court threatens the ability of all businesses—no matter how small and no matter where located—to engage in interstate commerce.

The danger posed to interstate commerce by the North Dakota decision is similar to the threat posed by the taxing standard advocated by the State of Wisconsin and other States in the state income tax case being heard in tandem with this one, *William Wrigley, Jr. Co. v. Wisconsin Department of Revenue*, 465 N.W.2d 800 (Wis. 1991), *cert. granted*, 60 U.S.L.W. 3257 (U.S. Oct. 7, 1991) (No. 91-119). *Amicus* TEI is concerned about the possible expansion of North Dakota's flawed analysis beyond the use tax area—specifically, to the ability of the States to tax income derived from interstate commerce.

Currently, federal legislation prohibits the States from imposing taxes on or measured by net income derived within the State from interstate commerce if the "only business activities within such State by or on behalf of such person" are solicitations of orders for sales of tangible personal property, where the orders are sent outside the State for approval or rejection and are filled by shipment or delivery from a point outside the State. *See* Pub. L. No. 86-272, 73 Stat. 555 (*codified at* 15 U.S.C. § 381 (1988)). The legislation, however, does not extend to sales of services or intangible property, and accordingly, restrictions on the States' ability to impose income taxes in respect of financial institutions and service industries

(among others)—and their ability to impose other types of taxes—continue to be governed by this Court's interpretation of the Commerce Clause. That the North Dakota decision implicates more than the States' ability to impose a use tax obligation on mail-order businesses is suggested by the Court's decision to hear the case in tandem with *William Wrigley, Jr. Co.*, which involves an interpretation of the federal statute.

Public Law No. 86-272, which was enacted in 1959, prohibits a state from taxing income derived from interstate commerce if the only activities of the out-of-state person within the state are "the solicitation of orders." *See William Wrigley, Jr. Co.*, 465 N.W.2d at 807.[14] In determining whether the taxpayer's activities fell within the ambit of Public Law No. 86-272, the Wisconsin Supreme Court held that solicitation "includes activities incidental to the initial contact between buyer and seller" even when "th[e] orders may be future orders." *Id.* at 809, 811. The Wisconsin court's holding that certain incidental or *de minimis* activities did not place the taxpayer beyond the protection of the federal statute is consistent with decisions reached by, among others, courts in New York Pennsylvania, and Indiana. *See Gillette Co. v. State Tax Comm'n*, 393 N.Y.S.2d 186, 191 (1977), *aff'd*, 382 N.E.2d 764 (1978); *United States Tobacco Co. v. Commonwealth*, 386 A.2d 471, 478 (Pa.), *cert. denied*, 439 U.S. 880 (1978); *Indiana Dep't of Revenue v. Kimberly-Clark Corp.*, 416 N.E.2d 1264, 1268 (Ind. 1981).

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[14] The rationale for the law limiting the States' ability to tax income from sales of tangible personal property has been explained in terms similar to those used in *National Bellas Hess*: "[T]he uncertainty of interstate tax liability and inevitable new reporting, accounting and tax costs presented a real threat which was inducing retreat of business from the free markets and the deprivation of consumer goods and services to the detriment of the American economy." *International Shoe Co. v. Cochreham*, 164 So. 2d 314, 321 (La.), *cert. denied*, 379 U.S. 902 (1964).

The authorities cited by the Wisconsin Supreme Court clearly and logically hold that its interpretation of the term "solicitation" is necessary to fulfill the purpose of Public Law No. 86-272. *William Wrigley, Jr. Co.*, 465 N.W.2d at 811-12. Thus, in *United States Tobacco Co. v. Commonwealth*, the Pennsylvania Supreme Court held that—

> making evanescent distinctions between "solicitation" and "solicitation plus" or "merchandising," when the activities in question were all incident to soliciting business, would defeat the very purpose of . . . [Public Law No. 86-272]. Solicitation cannot mean that a foreign corporation may do no more than send salespeople into another state who leave brochures describing their employer's products, hoping the prospective customer will then take the initiative to contact the employer for a possible sale.

386 A.2d at 478, *cited at William Wrigley, Jr. Co.*, 465 N.W.2d at 809-10. *See also Gillette Co.*, 393 N.Y.S.2d at 191 (restrictive construction of "solicitation" is "untenable" and, "if indulged in by the several states, [would] tend to 'Balkanize the American economy' "), *cited at William Wrigley, Jr. Co.*, 465 N.W.2d at 812.

The Wisconsin Department of Revenue, in contrast, has propounded an over-restrictive construction of Public Law No. 86-272 that would put even the replacement of stale or damaged merchandise by a sales representative beyond the pale. Petition for a Writ of Certiorari, *Wisconsin Dep't of Revenue v. William Wrigley, Jr. Co.* (No. 91-119). Experience teaches, however, that any sales representative who refuses to return such goods to the plant runs a very real risk of losing a customer. In other words, by adopting an absolutist approach to what constitutes "solicitation," the Wisconsin Department of Revenue would effectively render the federal statute a nullity and frustrate interstate commerce.[15]

[15] It would also confront interstate businesses with enormous compliance burdens, increasing dramatically the number of state income tax returns such businesses would be required to file. These burdens would be singularly non-productive. Wisconsin would tax a piece of Wrigley's income that, pursuant to Illinois's apportionment formula, is already being taxed. If successful in *Wrigley*, Wisconsin would presumably claim a comparable piece of every interstate business's income. If the other States follow suit (and employ similar apportionment formulae), the result could well be, not an increase in those businesses' aggregate income tax liability, but simply a time-consuming and inefficient shifting of income from one jurisdiction to another.

The relevance of the *Wrigley* case to *Quill* is this: it underscores that, for the States, the coin of the realm is not principle, but the end result—a finding of nexus. Thus, in tandem with their argument that *National Bellas Hess*'s bright-line standard should be consigned to history in favor of an amorphous "balancing" test that will conscript interstate businesses to be their collection agents,[16] the States seek refuge in an unreasonably strict interpretation of Public Law No. 86-272 on the grounds that there is a need for "clarity" and "certainty." *See* Petition for a Writ of Certiorari, at 17, 19-20, *Wisconsin Dep't of Revenue v. William Wrigley, Jr. Co.* (No. 91-119). Indeed, the test the Wisconsin Department of Revenue champions (and which other States endorse[17])

[16] "Anti-*Bellas Hess*" legislation, which seeks to make advertising by catalog or otherwise a sufficient nexus for sales and use tax purposes, has been enacted by 36 States: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, and West Virginia. *See* Laura A. Kulwicki, *State Taxation of Mail Order Sellers: An End to the Nexus Wars?*, 1 State Tax Notes 332, 332 n.1 and 341-42 (1991) (chart of sales and use tax statutes specifically applicable to mail-order sales).

[17] For example, 33 States joined a brief *amicus curiae* supporting this Court's review of the *Wrigley* case. *See* Brief of Amici Curiae in Support of Petition for Writ of Certiorari by the State of Iowa and the States of Alabama, Alaska, Arizona, Arkansas, California, Connecticut, Delaware, Florida, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri,

would establish an undeniable bright line: it would empower the States to ignore Public Law No. 86-272 in its entirety, thereby thwarting Congress's authority under the Commerce Clause to regulate interstate commerce.

In other words, the same States that decry a bright-line test on the use tax side of the ledger, cling desperately to an all-or-nothing interpretation of Public Law No. 86-272. *Amicus* TEI submits that the States' position in this case and *Wrigley* to do "whatever it takes to tax" should not be lost on the Court in either case.

III.

In renouncing this Court's decision in *National Bellas Hess*, the North Dakota court ignored a basic principle of constitutional adjudication: It is this Court that prescribes constitutional standards and the lower courts are obliged to adhere to those standards "no matter how misguided the judges of those courts may think [them] to be." *Hutto v. Davis*, 454 U.S. 370, 375 (1982); *accord Cooper v. Aaron*, 358 U.S. 1, 18 (1958); *The Mayor v. Cooper*, 73 U.S. (6 Wall.) 247, 253 (1867) (if the lower courts did not adhere to Supreme Court precedent, there would be "mischievous consequences").

As previously noted, 36 States have enacted legislation essentially in defiance of this Court's holding in *National Bellas Hess*.[18] While some of these statutes implicitly recognize that they are at odds with governing law and, hence, are contingent on intervening federal legislation or other federal authority, others fly straight in the face of this Court's precedents. Alabama, for example, perniciously deems the U.S. Postal Service to be the seller's

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Montana, Nebraska, New Mexico, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Virginia, and West Virginia, *Wisconsin Dep't of Revenue v. William Wrigley, Jr. Co.* (No. 91-119).

[18] *See* Kulwicki, *supra*, 1 State Tax Notes at 332 & n.1.

agent, even though *National Bellas Hess* clearly states that the use of common carriers or the mails will not provide sufficient nexus for Commerce Clause and Due Process purposes. 386 U.S. at 758; *see* Alabama Code § 40-23-1(a)(5) (Supp. 1990).

More dramatically, the Governor of North Dakota has himself declared that "[we] are taking the matter into our own hands." Carol Douglas, *State Officials Determined to Tax Interstate Mail-Order Sales*, 47 Tax Notes 1048 (1990) (quoting the Honorable George A. Sinner). Such massive resistance—regarding either the imposition of a direct tax or a use tax collection duty—cannot be tolerated. The defiant cries of the States—"taxation now, taxation tomorrow, taxation forever"—must not go unchallenged. If these actions by the States, untethered by principle, are not beyond the pale of the Commerce Clause, then just exactly what protection does the Clause provide?

The North Dakota court sought to justify its repudiation of *National Bellas Hess* by continual references to the "tremendous social, economic, commercial, and legal innovations" since the decision was rendered in 1967. App. A10; *see* App. A11 ("[t]he economic, social, and commercial landscape upon which [*National*] *Bellas Hess* was premised no longer exists"); App. A13 ("changes in marketing techniques have affected the economic and commercial landscape"); App. A21 ("wholesale changes in the social, economic, commercial, and legal arenas"). The degree of change is undeniable. It does not necessarily follow, however, that change itself empowers the States to disregard this Court's precedents.

Indeed, the Court's approach to the Commerce Clause—in *National Bellas Hess* and subsequent cases—should properly be viewed as having played a role in the growth and development of the mail-order industry. *Amicus* TEI submits that the Court should be loath to interfere with the clear pattern of commercial development that *National Bellas Hess* has fostered in the 25 years it has been

outstanding. This is especially the case since Congress has had countless opportunities to modify or overrule the Court, but has heretofore declined to exercise its primary jurisdiction under the Commerce Clause. *See* Hellerstein, *supra*, ¶ 6.17 (discussion of the congressional "stalemate" since the enactment of Public L. No. 86-272); Note, *supra*, 79 Geo. L.J. at 558-61 (discussion of recently proposed federal legislation).

In *Flood v. Kuhn*, 407 U.S. 258 (1972), Justice Blackmun expressed the Court's well-founded unwillingness to interfere with commercial relationships that had developed in reliance upon a decision of this Court. "If there is any inconsistency or illogic in all this," he wrote for the Court, "it is an inconsistency and illogic long standing that is to be remedied by Congress and not by this Court." *Id.* at 284. The reluctance voiced in *Flood v. Kuhn* should similarly manifest itself here. A quarter of a century of experience has reinforced the institutionalization of *National Bellas Hess*'s nexus rule and the judicial modification of the rule at this point would cause unwarranted commercial disruption.

Thus, *amicus* TEI respectfully suggests that if *National Bellas Hess* is to be repudiated—if the commercial relationships developed in reliance upon the decision are to be upended—it is for Congress to decide. "[O]nly Congress has both the ability to canvass the myriad facts and factors relevant to interstate taxation and the power to shape a nationwide system that [will] guarantee the States fair revenues and offer interstate businesses freedom from strangulation by multiple paperwork and tax burdens." *ASARCO, Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307, 331 (1982) (O'Connor, J., with Blackmun & Rehnquist, J.J., dissenting).[19]

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[19] *See Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 280 (1978), in which the Court stated: "It is clear that the legislative power granted to Congress by the Commerce Clause of the Constitution would amply justify the enactment of legislation requiring all States

Justice Frankfurter explained the quandary confronting the Court in his dissenting opinion in *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959):

> At best, this Court can only act negatively . . . . We cannot make a detailed inquiry into the incidence of economic burdens in order to determine the extent to which such burdens conflict with the necessities of national economic life. Neither can we devise appropriate standards for dividing up national revenue on the basis of more or less abstract principles of constitutional law, which cannot be responsive to the subtleties of the interrelated economies of Nation and State.
>
> The problem calls for solution by devising a congressional policy. Congress alone can provide for a full and thorough canvassing of the multitudinous and intricate factors which compose the problem of the taxing freedom of the States and the needed limits on such state taxing power.

Id. at 476 (Frankfurter, J., dissenting); *see* Leonard E. Kust, *State Taxation of Interstate Income: New Dimensions of an Old Problem*, 12 Tax Executive 45, 54 (1959).

Significantly, Congress exercised its legislative authority in the aftermath of the Court's decision in *Northwestern States Portland Cement Co.*, enacting Public Law No. 86-272 (discussed in part II, *supra*). *Amicus* TEI submits that if, after 25 years, the standard enunciated in *National Bellas Hess* is to be modified, that decision belongs to the national legislature. *Amicus* TEI also submits that Congress's failure to enact such legislation—notwithstanding repeated attempts—should only strengthen the Court's resolve against judicially overturning long-established and relied-upon precedent.

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to adhere to uniform rules for the division of income. It is to that body, and not this Court, that the Constitution has committed such policy decisions."

IV.

For a quarter of a century, interstate businesses have relied on *National Bellas Hess* in structuring their business affairs. The repudiation of the decision's bright-line test would represent a major departure from long-standing principles of Commerce Clause jurisprudence and, if effected at all, should be applied on a prospective-only basis. Indeed, the retroactive application of any decision curtailing the protections afforded by *National Bellas Hess* would work a major hardship on interstate commerce and unjustly reward the States for repudiating this Court's holdings. *Cf. Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971).

The retroactive abrogation of that decision's physical presence test would do more than wreak havoc among the interstate businesses that relied on the decision: it would also send an ominous signal to all taxpayers concerning their ability to rely on established rules. Interstate taxpayers would be deprived of the certainty necessary to conduct their business affairs in an orderly manner because they would have to assume that the Court's pronouncements may be only transitory. The ensuing uncertainty would undermine the very purpose of the Commerce Clause.

As to the businesses that have acted in reliance on *National Bellas Hess*, the retroactive modification of the Court's interpretation of the Commerce Clause to their detriment would be especially unfair. At issue in this case, of course, is not a seller's primary tax obligation, but rather an obligation to collect and remit taxes owing by others—the seller's customers. If interstate businesses declined to collect such use taxes in reliance on *National Bellas Hess* and that decision were overturned, they would likely be saddled with the liability themselves since the customers may be nowhere to be found. Retroactive imposition of such a burden on a third-party collection agent would be inimical to basic concepts of fair play. In

American Trucking Ass'ns v. Smith, 110 S. Ct. 2323, 2338 (1990), Justice O'Connor explained that "[w]hen the Court concludes that a law-changing decision should not be applied retroactively, its decision is usually based on its perception that such application would have a harsh and disruptive effect on those who relied on prior law." [20] Such a harsh and disruptive effect would undeniably be visited upon businesses that relied on *National Bellas Hess*.

Clearly, the standards enunciated in *Chevron Oil* for prospective-only treatment are present here: a decision overturning or constricting *National Bellas Hess* would establish "a new principle of law" that was not clearly foreseen; the non-retroactive application of the decision would not retard the operation of the rule (which would simply permit the States to impose use tax collection obligations on out-of-state businesses); and the non-retroactive application of the decision would be necessary to avoid injustice and hardship to the out-of-state businesses that relied in good faith on *National Bellas Hess*. *See Chevron Oil Co.*, 404 U.S. at 106-07 (*citing Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969)); *see* Albin C. Koch, Beam *Resolves Taxpayer Claims under* Davis *but* Quill *Raises New Prospectivity Issue*, 43 Tax Executive 321, 324-25 (1991) (the equities favoring prospective-only application of any decision overturning *National Bellas Hess* "appear to be significant").

Moreover, in the analogous area of an employer's responsibility to collect Social Security and withholding taxes from its employees, this Court has clearly held that the obligation to act as a third-party collecting agent must be unequivocal. Specifically, in *Central Illinois Pub-*

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[20] *See id.* at 2342 (the purpose of prospectivity is "cushioning the sometimes inequitable and disruptive effects of law-changing decisions"); *United States v. Estate of Donnelly*, 397 U.S. 286, 295 (1970) (Harlan, J., concurring) (doctrine of *stare decisis* is intended to "avoid jolting the expectations of parties to a transaction").

lic Service Co. v. United States, 435 U.S. 21 (1978), the Court said that "[b]ecause the employer is in a secondary position as to liability for any tax of the employee, it is a matter of obvious concern that . . . the employer's obligation to withhold be precise and not speculative." *Id.* at 31; *see id.* at 38 (Powell, J., with Burger, C.J., concurring) (fundamental fairness should prompt the Government to refrain from the retroactive assessment of a tax absent notice sufficiently explicit to inform a reasonably prudent person of the legal consequences of failure to comply with a law or regulation). Under the standard set forth in *Central Illinois*, interstate businesses that relied on this Court's decision in *National Bellas Hess* should not be subject to any use tax obligation prior to the time that decision is overturned.

Amicus TEI is also concerned that the retroactive application of any decision curtailing the protections afforded by the Commerce Clause and *National Bellas Hess* would unduly reward the States for their massive resistance to this Court's holding. The retroactive overruling of *National Bellas Hess* would send a signal to the States that they have nothing to lose by disregarding this Court's holdings and "rolling the dice" with taxpayers' Commerce Clause rights. It thus would sanction the flip side of, and the mirror image of the cynicism underlying, the States' refusal to refund taxes held to be unconstitutional *ab initio* by this Court. *See* Koch, *supra*, 43 Tax Executive at 321-22 (discussion of *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991); *Davis v. Michigan Dep't of Treasury*, 109 S. Ct. 1500 (1989); *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco of Florida*, 110 S. Ct. 2238 (1990); and *American Trucking Ass'ns, supra*).[21]

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[21] The most recent instance of the States' refusal to give force to this Court's pronouncements is Virginia's cursory treatment of *James B. Beam Distilling Co., supra*, to the question of the retroactivity of the Court's decision in *Davis*. *See Harper v. Virginia Dep't of Revenue*, No. 900770 (Va. filed Nov. 8, 1991) (holding that "nothing articulated in *Beam* requires a result different" from the Virginia court's refusal to apply *Davis* on a retroactive basis).

Amicus TEI believes the opposite signal should be sent: States should be placed on notice that they cannot disregard this Court's decisions with impunity and that they will not be permitted to reap the benefits of their defiance. Thus, any decision restricting the protections afforded by the Commerce Clause should be applied on a wholly prospective basis.

CONCLUSION

For the foregoing reasons, the decision of the Supreme Court of the State of North Dakota should be reversed.

Respectfully submitted,

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No. 91-194

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

QUILL CORPORATION,

Petitioner,

v.

STATE OF NORTH DAKOTA,
by and through its Tax Commissioner,
HEIDI HEITKAMP,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of North Dakota

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BRIEF OF THE AMICI CURIAE AMERICAN BANKERS ASSOCIATION AND AMERICAN FINANCIAL SERVICES ASSOCIATION IN SUPPORT OF PETITIONER

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17

QUESTION PRESENTED

Whether the North Dakota Supreme Court is obligated to follow the longstanding precedent of *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), in a case that is factually indistinguishable from *Bellas Hess*?

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BRIEF OF THE AMICI CURIAE AMERICAN BANKERS ASSOCIATION AND AMERICAN FINANCIAL SERVICES ASSOCIATION IN SUPPORT OF PETITIONER

INTEREST OF THE AMICI CURIAE

The American Bankers Association and the American Financial Services Association (hereinafter the "Associations") hereby respectfully submit this brief as amici curiae in support of the Petitioner and with the consent of both of the parties. The signed consents of each are filed together with this brief.

The American Bankers Association ("ABA") is the principal national trade association of the commercial banking industry in the United States, having as members both national and state-chartered banks, located in each of the fifty states and the District of Columbia. Member banks of the Association range from the smallest of community banks through regional, super regional and money center banks. Collectively, our membership holds over ninety percent of the assets of all domestic commercial banks.

The American Financial Services Association ("AFSA") is the principal national trade association representing non-bank providers of consumer financial services across the United States. These companies range from independently-owned consumer finance companies to the nation's largest financial services, retail and automobile companies. AFSA's members hold over $190 billion of consumer credit outstanding and over $50 billion in second mortgage credit—representing approximately one quarter of all consumer credit outstanding in the United States.

The Associations respectfully submit this brief to urge the Court to reverse the decision of the Supreme Court of North Dakota below. The court, in that decision, concluded that this Court's decision in *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), is not controlling precedent even though directly on point.

This case deals with the right of a state to require an out-of-state seller to collect sales and use tax and directly presents the question whether this Court's decision in *Bellas Hess* continues to be valid precedent.

Banks and other financial institutions, like any other for-profit business, are subject to state taxes. In a modern economy, financial institutions may have a substantial number of customers located in states where the financial institution itself does not and is not authorized to do business. Consequently, questions about which states may tax a financial institution, how such tax would be imposed, and the amount of such tax are of great importance to the commercial banking and financial service industries.

The Associations believe that *Bellas Hess* is still good law and should be reaffirmed. We adopt and support the arguments that the Petitioner advanced in the court below and will claim in this Court. Moreover, in addition, the Associations wish to bring to the Court's attention a somewhat different perspective which should not be overlooked as the Court considers this case.

SUMMARY OF THE ARGUMENT

The physical presence test for taxation is of enormous interest to the commercial banking and financial services industries. Financial transactions (*e.g.*, taking deposits and making loans) are conducted across state lines not only to facilitate commerce, but more importantly because state law restrictions bar the physical presence of financial institutions chartered in other states. Any move to abandon a physical presence test for state taxation in favor of an "economic presence" test would be an extraordinary expansion of state taxing authority, with consequences well beyond the mail-order sales and use tax issue presented in the *Quill* case. The Associations urge the Court not to prejudge the validity of the "economic pres-

ence" approach as it applies to state income or franchise taxes on financial institutions. That issue will come another day.

[6] *Bellas Hess* has not been eroded by some evolution of the doctrine of "nexus" as the court below has ruled. This Court has reaffirmed its holding in *Bellas Hess* on several occasions, most recently in 1989. However, our brief argues that, if this Court reconsiders its position on physical presence as a basis for sales and use tax collection, it should retain the physical presence standard for applying the Commerce Clause and Due Process Clause in determining state income or franchise tax jurisdiction.

ARGUMENT

If This Court Affirms The Jurisdiction Of A State Or Local Tax Authority To Require An Out-Of-State Mail Order Vendor To Collect And Remit Applicable Sales And Use Taxes On Sales To In-State Residents, The Holding Should Be Limited To The Collection And Remittance Of Sales And Use Taxes.

The ultimate issue presented by this case is whether *Bellas Hess* remains good law in light of this Court's evolving nexus doctrine. The Respondent's determination that this Court's decision in *Bellas Hess* is "obsole[te]", and therefore not binding on the courts of North Dakota is misplaced. Contrary to the North Dakota court's analysis, no legal or factual change has undermined the principles of *Bellas Hess*.[1] Despite

[1] In this regard, the Associations have what might be called a "corporate interest" as well as a representative interest on behalf of their memberships. Like many national nonprofit trade associations, the ABA and AFSA distribute educational products

the North Dakota court's protestations, this Court has never doubted *Bellas Hess*, and its rulings have consistently followed *Bellas Hess* since 1967.

The Associations believe that *Bellas Hess* is still good law and should be reaffirmed for the reasons set forth in the Brief of the Petitioner. No point would be served by our repetition of those arguments which we support. However, if this Court determines that technological advances and economic developments have so dramatically changed the mail order industry since the 1967 *Bellas Hess* decision as to render its holding obsolete, then any new nexus standard adopted by this Court should be limited to use tax collection responsibility only; and not expanded to the imposition of other kinds of taxes, such as an income or franchise tax, that may be applicable to banks and other entities that do not enjoy the immunity from income based taxes provided by P.L. 86-272, 15 U.S.C. 381 (1959).[2]

to their members in all fifty states by mail or common carrier; but do not have a physical presence in most of those states. If this Court overrules *Bellas Hess*, the Associations will become liable for the administrative and recordkeeping burden of dealing with a multitude of different tax structures which this Court correctly found to exist in 1967 and which continue to exist today. Imposing these burdens now would frustrate, impede, and defeat the tax-exempt purposes of these and similarly situated associations by diverting limited resources away from educational and information services to unproductive uses.

[2] P.L. 86-272, among other protections, prohibits states from taxing the income earned by out-of-state retailers or manufacturers which have no physical presence within the state and whose only contacts with the state are by mail or common carrier. Since only sellers of tangible personal property enjoy the immunity provided by P.L. 86-272, the concern raised in this argument equally applies to all service providers, not only banks.

1. The Bright Line Physical Presence Test Is Essential In Determining Income Or Franchise Tax Jurisdiction.

With respect to use taxes, the out-of-state retailer, while bearing the substantial and onerous collection and compliance burden, does not itself directly bear the burden of the tax. The direct burden of the tax falls solely on the in-state resident customer. As is appropriate, the taxpayer (*i.e.*, the in-state customer) is the primary beneficiary of the infrastructure of the state of residence.

With an income or franchise tax, on the other hand, a nonresident service provider such as a bank (as opposed to the in-state customer) would be the taxpayer on whom the direct tax falls. An entity with no physical presence in the taxing state, that conducts its interstate business in a manner like that of National Bellas Hess, and, therefore, does not benefit from the infrastructure of the state in which its customers reside, should not bear any direct tax burden sought to be imposed by that state.[3]

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[3] Indeed, this Court has long recognized that a higher nexus threshold applies with respect to the taxation of an out-of-state seller than with respect to an in-state resident. The cases of *McLeod v. Dilworth Co.*, 322 U.S. 327 (1944), and *General Trading Co. v. Tax Commissioner*, 322 U.S. 335 (1944), are illustrative in this regard. These cases involved virtually identical facts except that *McLeod* involved a sales tax imposed directly upon an out-of-state retailer and *General Trading Co.* involved a use tax collection responsibility imposed upon an out-of-state retailer. In both cases, the out-of-state corporations were not qualified to do business in the taxing state and had no office or place of business there but did solicit orders from its residents by traveling salesmen. In the *McLeod* case, the sales tax was held unconstitutional; in the *General Trading Co.* case, the use tax collection responsibility was upheld. The dissents, in both cases, make it apparent that the majority reached different results in the two cases solely because of the nature of the tax imposed. The *McLeod* court recognized this to be a difference of substance and not merely form.

Moreover, with respect to taxes imposed on, or measured by, net income, another important distinction is that manufacturers and retailers generally are protected from such tax derived from selling tangible personal property, so long as their activities do not exceed the permissible boundaries of P.L. 86-272. Even this protection established by Congress, because it does not provide a bright line standard of nexus, has resulted in years of litigation.

Banks, finance companies, and other service providers, continue to require a bright line nexus standard since they do not enjoy any of the protections of P.L. 86-272[4]—however such protections may be interpreted by this Court. In addition, a bright line test is imperative for orderly interstate commercial activity in so far as it brings certainty to business planning and the ability to comply with state tax laws. A substantial local presence rule, such as that mandated by

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[4] At the time P.L. 86-272 was adopted in 1959, national banks were already federally protected from the threat of state taxation, by a state other than the state in which it was located, under the National Bank Act of 1864 (Section 5219 of the Revised Statutes). Thus, there was no need for Congress to include financial institutions under the umbrella protection of P.L. 86-272. However, the protection under the National Bank Act of 1864 was removed with the passage of the State Taxation of Depositories Act of 1969. The 1969 Act was delayed by various Public Law enactments and finally became law when P.L. 93-100 expired in September 1976. Thus, today, national banks are subject to nondiscriminatory state taxation *provided* the bank has a taxable nexus with the state and the tax is not otherwise unlawful.

Bellas Hess, enhances and protects interstate activity by allowing a business which chooses to conduct its activities from its home state to do so under conditions of certainty without fear of "local entanglements", often unexpected, inadvertent and not easily determinable. Any departure from a bright-line test such as the physical presence standard established by *Bellas Hess* will lead to confusion and continued expensive litigation over the degree of "economic presence" that is required before a state has the requisite jurisdiction to tax.

Accordingly, the commercial banking and financial service industries are wary of any expansion of the scope of income or franchise tax jurisdictional standards, whether by the states or by Congress, irrespective of any changes to the jurisdictional standards applicable in the area of use tax collection responsibility.

2. The Failure To Restrict Any Expanded Jurisdictional Standard To Sales And Use Taxes Will Adversely Affect The Commerce Clause Standard As It Applies To Income Or Franchise Taxes.

If the Court permits any expansion of tax jurisdiction standards to income or franchise taxes, then it may soon be called upon to address the Commerce Clause limitations on state taxation of out-of-state financial institutions as well as other service industries. As enunciated in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), a state tax imposed on an out-of-state corporation will not pass scrutiny under the Commerce Clause unless "the tax is (1) applied to an activity with a substantial nexus with the taxing state; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is

fairly related to the services provided by the state." 430 U.S. at 279.

Consequently, if the nexus standard is expanded, this Court could soon be asked to determine the applicability of the "economic presence" theory to taxation of out-of-state financial institutions. The Court would be presented with such questions as minimum contacts, fair apportionment, discrimination against out-of-state financial institutions, and the relationship of the tax burden to the services provided by the state.

The minimum contacts question has a unique status with respect to banks and overlaps with the issue of discrimination against out-of-state corporations. Banks have long been subject to state law prohibitions against branching[5] as well as prohibitions imposed on bank holding companies against acquiring offices beyond their home state.[6] To date, only eleven states permit non-reciprocal nationwide banking through a bank holding company structure (but not interstate branching), while the remaining thirty-nine limit the bank holding company's ability to enter their markets. Notwithstanding these restrictions, four states (Minnesota, Indiana, Tennessee and West Virginia) have enacted "economic presence" statutes that assert that

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[5] Under the McFadden Act, 12 U.S.C. 36, intrastate branching by national banks is permitted to the same extent as similarly situated state-chartered banks can establish branches. Under the Act, however, interstate branching by national banks is prohibited.

[6] Under the Bank Holding Company Act, 12 U.S.C. 1843(d), out-of-state bank holding companies are prohibited from acquiring a bank in another state unless expressly authorized by state law.

banks are subject to income or franchise taxes based on the mere presence of 20 credit card customers or $5 million of assets within their states—even though the out-of-state bank is legally barred from opening a branch. Such discrimination against a nonresident is prohibited under the third prong of the *Complete Auto* standard.

Furthermore, if an "economic presence" standard is adopted by this Court but it is not limited to sales and use taxes, the Court could become entangled in the thorny questions of judicially fashioning rules apportioning bank income among the states. These are especially difficult apportionment issues because the states that have adopted an "economic presence" standard for taxing the income of financial institutions have not adopted uniform apportionment rules. Each state tends to skew the formulae in order to obtain the greatest possible tax revenue, without regard to the absence of real and substantial services derived by the tax-burdened financial institutions. At the same time, the state that truly provides services to the financial institution, *i.e.*, the state of domicile, taxes the same income that is sought by the state in which an "economic presence" is deemed to exist. Since the financial institution's state of domicile does not permit a tax credit for income taxes paid to other states, double, and in some cases perhaps multiple, tax is imposed on the same dollar of earnings.

3. As A Matter Of Public Policy, This Court Should Not Expand The Jurisdiction Of State And Local Governments To Impose Taxes Based On The Income Of Out-Of-State Financial Institutions.

The Associations respectfully urge the Court to note several important public policy considerations that could affect the commercial banking and financial service industries if the general applicability of the *Bellas Hess* standard is eroded.

First, expanded tax jurisdiction will lead to multiple taxation of the same income because the states do not agree on a uniform division of financial institution income. At issue, therefore, is the ability of the banking industry to conduct its business—accept deposits and make loans—in a safe and sound manner as mandated by its regulators. State and local tax expense, and the threat of multiple state tax exposure, are significant financial risks facing the American banking and financial services industries today. In addition, the lack of uniformity among the states adopting an "economic presence" standard will lead to significant increased tax compliance costs. Moreover, under such statutes, financial institutions would be paying for infrastructure and services that they do not receive, while at the same time they are legally prohibited from establishing a physical presence in which to conduct their business fully. Such treatment flies in the face of the protections afforded by the Commerce and Due Process Clauses of the United States Constitution.

Other unintended effects may follow from an increased tax burden and the uncertainty of complying with "economic presence" income tax statutes. One result could be the restricted availability of credit

across states lines.[7] Furthermore, attempts by the states to enforce tax assessments based on "economic presence" laws will lead to litigation and appeals, ultimately to this Court, involving not only the Commerce Clause and Due Process claims of the banks, but also issues arising out of the National Bank Act of 1864, Ch. 106, 13 Stat. 99 (1864), and the Depository Institutions Deregulation and Monetary Control Act of 1980, United States P.L. 96-221, 94 Stat. 132 (1980).

Thus, the issues generated by the application of an "economic presence" standard range far beyond the narrow, albeit critical issues presented by this case. Therefore, any endorsement of the "economic presence" standard, or any other expansion of state jurisdiction to tax which may be formulated by this Court, should be limited to sales and use tax collection.

CONCLUSION

This Court's 1967 decision in *Bellas Hess* has not been eroded by the evolution of the doctrine of nexus over the past twenty-five years. The reasoning underlying the *Bellas Hess* decision has been affirmed by this Court on several occasions and as recently as 1989. The North Dakota court's departure from the tax nexus standard of physical presence, consistently applied for approximately twenty-five years, should not be permitted since the "economic presence" standard is neither an appropriate nor a practical standard for assessing tax collection liability. Therefore, the Associations urge the Court to reaffirm its holding in *Bellas Hess*.

[7] Neubig, *The Economic Effects of Destination-Source Taxation of Financial Institutions*, 6 Journal of Bank Taxation 16 (Summer 1991).

However, if the Court should decide this case in favor of the State of North Dakota, the commercial banking and financial service industries respectfully submit that the Court is not required to expand such holding beyond the limited issue of sales and use tax collection presented in this case. Any expansion beyond the sales and use tax collection area and into the area of income or franchise tax jurisdiction is beyond the scope of this case, will create business planning and tax compliance uncertainties and will adversely affect the Commerce Clause standards adopted by this Court.

For all of the reasons stated herein, the American Bankers Association and the American Financial Services Association respectfully urge that the North Dakota Supreme Court's decision in *Quill* be overruled.

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NORTH DAKOTA DEPARTMENT OF REVENUE,
RESPONDENT.

ON WRIT OF CERTIORARI FROM THE SUPREME COURT,
STATE OF NORTH DAKOTA.

BRIEF OF AMICUS CURIAE DIRECT MARKETING ASSOCIATION IN SUPPORT OF APPELLANT QUILL CORPORATION

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New York Times, "Europeans Reach Accord on Sales Tax," p. D10 (June 25, 1991) 16n

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Statement of Interest of Direct Marketing Association.

The Direct Marketing Association ("DMA") files this brief in support of the position of Petitioner, Quill Corporation ("Quill").[1]

Direct Marketing Association, a not-for-profit corporation, is the largest and oldest national trade association in the United States representing companies involved in direct-to-the-consumer mail advertising and marketing. DMA's membership totals more than 3,200 firms located in all 50 states and 40 foreign countries. A majority of the Association's members are mail order houses, from Fortune "500" companies to "mom and pop" operations that continue to prepare their catalogs on kitchen table tops. Approximately twenty percent of DMA's members employ fewer than four employees, and eighty-five percent of its members have sales of under ten million dollars.

Most of DMA's members sell exclusively by means of interstate commerce — sending catalogs and other advertising materials by U.S. Mail, receiving orders for goods by mail or by telephone, and delivering goods to customers by interstate common carriers. Under these circumstances, DMA and its members have a special interest in the constitutional standard adopted by this Court for determining when out-of-state retailers must collect sales and use taxes.

DMA's members have relied on a long line of U.S. Supreme Court cases, including *National Bellas Hess, Inc.* v. *Illinois Revenue Dep't.*, 386 U.S. 753 (1967), in which this Court has held that states may not impose use tax collection duties on out-of-state retailers unless those companies have a physical nexus with the taxing state. If the North Dakota Supreme Court's "reversal" of *Bellas Hess* were upheld, enormous and confusingly discrepant administrative burdens would be created for mail order marketers in collecting and remitting use taxes on behalf of over 6,100 taxing jurisdictions throughout

[1] Written consent of both parties to the filing by DMA as an *amicus* is on file with the office of the Clerk of the Court.

the country. The compliance burdens would be staggering. Moreover, DMA's members would be exposed to liability for billions of dollars of back taxes — a blow which would threaten the very survival of most mail order companies.

This Court's abandonment of the *Bellas Hess* standard would have an immediate, adverse impact on DMA's members. If a change in that standard is warranted, then Congress, rather than the courts, should effect that change after taking into consideration the interests of both interstate marketers and the states. As pointed out in *National Bellas Hess,* 386 U.S. at 760, "this is a domain where Congress alone has the power of regulation and control." Congress can fashion uniform rules in this area of tax administration to balance the states' interests against the needs of a national market place, while also providing sufficient safeguards to the mail order industry.

Summary of Argument.

The decision of the North Dakota Supreme Court is contrary to more than 24 years of established United States Supreme Court precedent dealing with use tax collection responsibilities of out-of-state mail order companies. The North Dakota Supreme Court's disregard for the substantial burdens imposed on interstate mail order companies by that court's new "economic nexus" standard is simply an extension of the same approach contained in the underlying use tax statute enacted by the North Dakota legislature. Unlike bills recently proposed in Congress, which attempted to balance state and industry interests by standardizing tax rates within states, simplifying collection and reporting arrangements, and establishing specified sales volume thresholds, the North Dakota statute casts its net widely and indiscriminately. By broad legislative fiat, all out-of-state retailers (who mail at least three catalogs into the state per year) must comply with every detail of North Dakota's sales and use tax regulations.

In reality, however, this case is not only about the taxing authority of the State of North Dakota or about the business

operations of one large mail order company. Much to the contrary, the new nexus standard announced by the North Dakota Supreme Court, if accepted by this Court, would enable over 6,100 state and local sales tax jurisdictions to compel all mail order companies, including the many small and unsophisticated companies which make up the bulk of the mail order industry, to act as their collection agents.

The North Dakota Supreme Court makes unsubstantiated claims about the changed circumstances, both technological and economic, surrounding the mail order industry. In contrast, the record developed at Congressional hearings, as well as before the Congressionally authorized Advisory Commission on Intergovernmental Relations ("ACIR"), demonstrates the enormous administrative burden on the mail order industry, and in particular on small companies, which would occur if out-of-state retailers were required to collect use taxes on behalf of states and localities throughout the United States. Certainly, the record in this case does not present this Court with a comprehensive view of the impact of a reversal of the *Bellas Hess* doctrine.

Congress' repeated consideration but failure to enact legislation which would have replaced the *Bellas Hess* standard evidences its continued acceptance of the *Bellas Hess* rule. Under such circumstances, the remedy, if any, is for Congressional, and not judicial, action.

Further, North Dakota and the state *amici* do not seek from this Court a carefully crafted decision that would establish a defined, but limited, set of circumstances and conditions under which the states could expand their tax jurisdiction beyond current constitutional restraints. In fact, the tools available to courts are not well-suited to making these delicate adjustments. Such policy considerations are more appropriately addressed by Congress, which is well-equipped not only to investigate the facts relating to the use tax collection controversy, but also to develop a statutory scheme which balances the interests of the states and the industry.

Only Congress can establish a *de minimis* exemption for small companies with sales below a specified threshold. Cer-

tainly, such an exemption would protect small companies which lack the resources and personnel to shoulder the heavy burdens associated with multi-jurisdiction use tax collection. Only Congress can establish uniform tax rates, uniform product exemptions, uniform filing requirements and simplified audit procedures to reduce the enormous burden and expense of use tax collection on all mail order vendors. Only Congress can establish a transition period to permit sufficient time for publication of catalog notices and to facilitate the implementation of administrative systems to collect state use taxes. In short, Congress alone can choose among several alternatives to mitigate the burdens and improve the efficiencies of use tax collection. These options are simply not available to the courts.

The Commerce Clause was intended to replace a parochial state-by-state approach to the regulation of commerce with a national view of the needs of interstate commerce and the interests of those who rely on such commerce. There can be no doubt that the North Dakota legislature, in enacting its mail order use tax statute, was concerned with only one objective — increasing state revenues in hard economic times. This Court should continue to invalidate state fiscal initiatives that evidence no concern for the attendant adverse impact on interstate commerce.

Finally, what is at stake in this lawsuit extends beyond the future obligations of mail order companies to collect state use taxes. An additional and ominous consequence of the reversal of *Bellas Hess* — unless limited by this Court to purely prospective application — would be back-tax assessments against mail order companies for literally billions of dollars. The reliance of mail order companies on 24 years of settled Supreme Court precedent, coupled with the principle of *stare decisis*, militate against judicial abandonment of the *Bellas Hess* doctrine. If a new rule is to be established, Congress should enact it.

Argument.

I. Congress Rather Than the Courts Should Decide Whether to Abandon the Bellas Hess Standard.

The North Dakota Supreme Court refused to apply *Bellas Hess* on the ground that its physical presence test fails to reflect economic and technological changes that have occurred since 1967 and because it rests on obsolete legal precedent. As discussed in Section II, *infra*, neither ground is persuasive. Moreover, it is Congress, and not the courts, that can balance, by carefully crafted legislation, the competing policy considerations presented by some states' desires to impose tax collection and other regulatory burdens on interstate marketers.

A. *Congress Is The Appropriate Body To Make Changes To The Bellas Hess Standard.*

Congress, by legislation, can authorize the states to adopt legislation that would, in the absence of the Congressional authorization, violate the Commerce Clause. *Western & Southern Life Insurance Co.* v. *Bd. of Equalization*, 451 U.S. 648, 652-53 (1980). Since, in a long line of decisions defining the nexus standard, this Court has already drawn the balance between "the competing demands of state and national interests," it is up to Congress, and not the courts, "to redefine the distribution of power over interstate commerce." *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 769 (1945). This Court should defer to Congress to make any changes in the *Bellas Hess* standard, if such changes are needed, for several reasons.

First, Congress can compile a more complete factual record on which to base sensitive economic policy decisions. Professors Hellerstein and Hartman[2] have noted that it is Congress rather than the courts that should promulgate any new standards in the area of multistate taxation:

[2] The North Dakota Supreme Court relied heavily on the writings of Professor Hartman. (470 N.W.2d at 209, 214, 215, 217, 218.)

> As Professor Paul J. Hartman has argued persuasively in his writing, the institutional nature of a judicial tribunal and the constitutional inability of the Supreme Court under the commerce clause to do more than restrain undue state tax burdens on interstate commerce make the Court inherently incapable of dealing adequately with the complex problems posed by state and local taxation of multistate enterprises. Congress, on the other hand, with its committees, staffs, and public hearings, can examine problems and develop solutions that it has the power to implement by legislation. [J. Hellerstein, *State Taxation Under the Commerce Clause: An Historical Perspective*, 29 Vand. L.Rev. 335, 339 (1976)[3] (footnotes omitted).]

Second, the task of setting a new standard, after weighing the demands of states[4] against the interests of the mail order industry, is better suited to Congress than to the courts. For these reasons, Professor Hartman advocates only a legislative overruling of *Bellas Hess*. P. Hartman, *Collection of Use Tax on Out-of-State Mail-Order Sales*, 39 Vand. L. Rev. 993, 1028 (1986). He stated the rationale as follows:

> In the absence of congressional action, compliance cost burdens associated with sales tax collections in multiple jurisdictions would be particularly burdensome for the smaller out-of-state seller, which presumably would find it necessary to be familiar with the tax laws in all the state and local taxing jurisdictions where it makes sales. In view of the multiplicity of

[3]*See also* A. Cox, *The Role of Congress in Constitutional Determinations*, 40 Cinn. L. Rev. 199, 209 (1971) ("[T]he legislature is, or at least can be, a better fact-finding body than an appellate court. . . . Courts have always found it hard to develop the background facts in constitutional cases. Judicial notice often means only intuition or prejudice.").

[4]Certainly, some states believe they will be harmed *Bellas Hess* is overturned. *See amicus* brief of New Hampshire, *et al*.

> use tax rules in different state and local governments, the mail-order seller would be saddled with high compliance cost burdens if it is required to comply with the differing tax code provisions for forty-five states, the District of Columbia, and between 6,400 and 7,000 local governments that now impose such taxes. In addition to rate differentials, exempt items and taxed buyers vary a great deal from state to state. This administrative burden could conceivably stifle some interstate sales. [*Id*. at 1015-16 (footnote omitted).]

The ACIR[5] recently considered the question of whether existing constitutional restrictions on the states' power to impose use tax collection duties on mail order companies should be eliminated or altered. Advisory Commission on Intergovernmental Relations, *State and Local Taxation of Out-of-State Mail Order Sales* (April, 1986) ("ACIR 1986 Study"). In examining the effect of the *Bellas Hess* standard on both state tax revenues and the operations of interstate mail order companies, the ACIR emphasized that this subject involved the difficult question of whether it was "possible to shield interstate commerce from undue state tax burdens without causing serious tax losses for state governments?" (*ACIR 1986 Study* at 1.)

The ACIR 1986 Study, in fact, rejected litigation as a method to modify or overturn the existing nexus standard for several reasons, including the fact that litigation "addresses the problems in a piecemeal fashion . . .; the litigation process has no possibility of addressing the political-administrative problems involved in taxing mail-order sales, such as compliance costs or the multiplicity of state-local tax rates." (*ACIR 1986 Study* at 13.) Because a full range of issues would need to be addressed before revising the *Bellas Hess* standard, ACIR strongly recommended a Congressional solution rather than a judicial standard (*ACIR 1986 Study* at 14, 18):

[5]The ACIR is a Congressionally established agency whose mandate is to represent the interests of state and local governments, and the public, in monitoring and recommending improvements to the operation of the federal system.

> In sharp contrast to a judicial solution of the problem, Congressional action could weigh a broader business presence standard against legitimate business concerns about compliance costs and protection for small firms. Business interest in a *de minimis* rule, uniform state-local rates, and amnesty for prior taxes could be addressed in legislation. All of the economic issues — tax revenues, competition, and compliance costs — could be resolved through appropriate legislation.
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> In the judgment of the majority of the Commission, only carefully crafted Congressional action can both negate the *National Bellas Hess* decision and achieve a delicate but essential balance.

Certainly, the setting of a new standard is a more appropriate activity for Congress than for the courts. As stated in *Moorman Mfg. Co.* v. *Bair*, 437 U.S. 267, 280 (1978):

> It is clear that the legislative power granted to Congress by the Commerce Clause of the Constitution would amply justify the enactment of legislation requiring all States to adhere to uniform rules for the division of income. It is to that body, and not this Court, that the Constitution has committed such policy decisions.

Third, the Court has established fifty years of precedent on which the industry has relied. As Justice O'Connor stated in her dissenting opinion in *American Trucking Association, Inc.* v. *Scheiner*, 483 U.S. 266, 301 (1987), in view of the reliance interests of the industry, "if a new rule is to be declared, Congress should do it." *Id.* at 301. *See also Capitol Greyhound Lines* v. *Brice*, 339 U.S. 542, 547 (1950).

Fourth, the doctrine of *stare decisis* counsels in favor of this Court deferring to Congress and not overturning the *Bellas Hess* standard. In this case, an entire industry has justifiably

relied on the standard set forth in a long line of U.S. Supreme Court cases, reinforced by Congressional refusal to alter that standard. As Chief Justice Rehnquist stated, "[C]onsiderations in favor of *stare decisis* are at their acme in cases . . . where reliance interests are involved." *Payne* v. *Tennessee*, U.S. , 111 S.Ct. 2597, 2610 (1991).[6] If ever there were a case where settled expectations should prevent this Court from disturbing its established precedent, this is it.[7] Not only has the mail order industry relied on this Court's settled precedents, it has also relied on Congress' refusal to change that standard.

B. *Congress Has Repeatedly Considered Whether To Change The Bellas Hess Standard And Has Decided Against It.*

Bills have been repeatedly introduced in Congress to empower states, under certain limited conditions, to require mail order sellers to collect state use taxes.[8] These bills were de-

[6] The Court has found it appropriate to overrule prior changes where "correction through legislative action is impossible." *Payne* v. *Tennessee*, U.S. , 111 S.Ct. at 2609 (1991). Here, however, Congress has the opportunity to revoke, adjust or expand the *Bellas Hess* standard. There is no Congressional impotence on this issue under the Commerce Clause.

[7] *See also American Trucking Associations, Inc.* v. *Smith*, U.S. , 110 S.Ct. 2323, 2345 (1990) (Scalia, J. concurring) ("Although I will not apply negative Commerce Clause decisional theories to new matters coming before us, *stare decisis* — that is to say, a respect for the needs of the legal system — would normally cause me to adhere to a decision of this Court already rendered as to the unconstitutionality of a particular type of state law.")

[8] *See, e.g.*, S. 2368 and S. 2913, 100th Cong., 2nd Sess. (1988); H.R. 1242 H.R. 1891 and H.R. 3521, 100th Cong., 1st Sess. (1987); S. 639 and S. 1099, 100th Cong., 1st Sess. (1987); H.R. 3549, 99th Cong., 2d Sess. (1986); S. 1510 and S. 2913, 99th Cong., 2d Sess. (1986). In addition, extensive evidence on the subject of use tax collection was presented to the various Congressional subcommittees. *See, Interstate Sales Tax Collection Act of 1987 and the Equity in Interstate Competition Act of 1987: Hearings on H.R. 1242, H.R. 1891, and H.R. 3521 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 100th Cong., 2d Sess. (1988) ("1988 House Hearings"); *Collection of State Sales and Use Taxes by Out-of-State Vendors: Hearing on S. 639 and S. 1099 Before the Subcomm. on Taxation and Debt Management of the Senate Comm. on Finance*, 100th Cong., 1st Sess. (1987) ("1987 Senate Hearings"); *Interstate Sales Tax Collection Act of 1987: Hearing on H.R. 1242 Before the Subcomm. on Select Revenue Measures*

signed to overturn the *Bellas Hess* line of cases by employing Congress' authority to legislate under the Commerce Clause.[9] Each bill involved complex policy issues which were carefully reviewed and debated in Congressional committees. Each bill provided some of the protections to the mail order industry which ACIR had recommended in its study.[10]

Legislation was not passed, however, because Congress concluded that the safeguards proposed for the industry were not sufficient. For example, after the bills were introduced, the states and municipalities voiced opposition to a uniform tax rate within each state, and instead lobbied, in effect, that mail order companies be held responsible for collection at the tax rate for each separate jurisdiction that has a sales and use tax.[11] After careful consideration of the consequences, Congress declined to disturb the established nexus standard, but, instead, relied on existing Supreme Court precedent as setting forth

of the House Comm. on Ways and Means, 100th Cong., 1st Sess. (1987) ("1987 House Hearings"); *State Taxation of Interstate Commerce: Hearing on S. 1510 Before the Subcomm. on Taxation and Debt Management of the Senate Comm. on Finance*, 99th Cong., 1st Sess. (1985) ("1985 Senate Hearings").

[9] *See, e.g.*, 132 Cong. Rec. S 15691 October 8, 1986. ("[T]he commerce clause of the Constitution . . . reserves to the Congress the power to regulate and control interstate commerce. . . . Congress should exercise that power in favor of the States" by overturning *National Bellas Hess*.) (Remarks of Senator Long upon introduction of S. 2913, 99th Cong., 2d Sess. (1986).)

[10] In its 1986 study, ACIR recommended federal legislation that would include a *de minimis* exemption so that a company with annual nationwide sales of less than $12.5 million would not be required to collect the sales and use tax of any state so long as it had no physical presence in the state. The ACIR-recommended legislation also provided for a single tax rate within each state, thereby reducing the number of tax rates to 46. The proposal also contained an amnesty provision to protect companies from indeterminate liabilities for back taxes. (*ACIR 1986 Study* at 16-18.)

[11] Indeed, Congressman Brooks, the sponsor of bills, H.R. 1891 and 3521, that contained many of the ACIR-recommended features, and the Chairman of the Subcommittee considering legislation, noted that the proposal of the state and local governments was unacceptable, because the proposal required companies to collect "taxes in every county and city and each State . . . and it is impractical to expect even the computerized mail order houses to figure out the tax and the volume in every county and every city in the State of Texas, much less every city in the nation." (*See* 1988 House Hearings at 389.)

the proper balance.[12] Undoubtedly, Congress will be asked to revisit this issue again in the future.

C. *Because Congress Has Paramount Authority Under The Commerce Clause, This Court Should Be Reluctant To Act In the Face of Congressional Inaction.*

This Court has traditionally been wary to allow potential barriers to trade where Congress has not acted. In holding the Illinois use tax statute unconstitutional, this Court stated in *National Bellas Hess, supra*, 386 U.S. at 760, the following:

> The very purpose of the Commerce Clause was to ensure a national economy free from such unjustifiable local entanglements. Under the Constitution, this is a domain where Congress alone has the power of regulation and control. [Footnote omitted.]

The North Dakota statute exemplifies the type of parochial legislation that would place undue burdens on interstate commerce, a result the Commerce Clause is intended to prevent. As Mr. Justice Holmes stated:

> I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think that the Union would be imperiled if we could not make that declaration as to the laws of the several States. *For one in my place sees how often a local policy prevails with those who are not trained to national views and how often action is taken that embodies what the Commerce Clause was meant to end.* [Holmes, "Law and the Court" in *Collected Legal Papers* 291, 295-96 (1920) (emphasis added).]

[12] It should be noted that during the Congressional hearings industry members supported legislation which would authorize collection of use taxes but reduce the administrative burden to mail order companies of doing the same. *See* 1988 House Hearings at 210-211. (Testimony of L.L. Bean Executive Vice President William End suggesting a uniform tax, uniform list of exemptions and uniform reporting and audit procedures, or in the alternative, a sales tax levied by the state in which the retailer is located as opposed to where the goods are sent.) The states have rejected these proposals.

This Court has consistently interpreted the Commerce Clause "to ensure that States do not disrupt or burden interstate commerce when Congress' power remains unexercised: it protects the free flow of commerce, and thereby safeguards Congress' latent power from encroachment by the several States." *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 154 (1982). Thus, the Commerce Clause reflects "a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Hughes* v. *Oklahoma*, 441 U.S. 322, 325-26 (1979) (quoted with approval in *Wardair Canada, Inc.* v. *Florida Dept. of Revenue*, 477 U.S. 577 (1986)).[13]

In *Bellas Hess*, the Court applied these principles and confirmed the nexus standard. The Court made it clear that if the standard is to change, it should be for Congress, not the states, to make that change. 386 U.S. at 760.

Congress' failure to make such changes, despite its frequent consideration of legislation to do so, indicates its continued acceptance of the *Bellas Hess* standard. This Court should be reluctant to change a standard which Congress analyzed closely during hearings and then decided not to modify. Such judicial restraint is particularly appropriate in view of Congress' paramount power under the Commerce Clause. As this Court has stated, "[w]hen, therefore, Congress has posited a regime of state regulation on the continuing validity of specific prior decisions . . ., we should be loathe to change them." *State Bd. of Insurance* v. *Todd Shipyards Corp.*, 370 U.S. 451, 457 (1962).

Even when this Court has questioned the wisdom of its precedent, it has, nonetheless, deferred to Congress and con-

[13] *See, e.g.*, the writings of Hamilton and Madison advocating free trade and the need for national, as opposed to state, control of commerce. *The Federalist Papers*, Number 7 at 62-63, Number 11 at 89, Number 22 at 144-145, Number 42 at 267 (C. Rossiter ed. 1961).

tinued its acceptance of existing doctrine. For example, in *Flood* v. *Kuhn*, 407 U.S. 258 (1972), the Court considered whether to overrule *Federal Baseball Club* v. *National League*, 259 U.S. 200 (1922) and *Toolson* v. *New York Yankees, Inc.*, 346 U.S. 356 (1953), and make baseball subject to the antitrust laws. Although the Court noted that its decision in *Federal Baseball* was "an anomaly" and "an aberration", the Court refused to reverse the decisions. Justice Blackmun, writing for the majority, stated the grounds for the decision as follows:

> The Court has emphasized that since 1922 baseball, with full and continuing Congressional awareness, has been allowed to develop and to expand unhindered by federal legislative action. *Remedial legislation has been introduced repeatedly in Congress but none has ever been enacted. The Court, accordingly, has concluded that Congress as yet has had no intention to subject baseball's reserve system to the reach of the antitrust statutes*. This, obviously, has been deemed to be something other than mere Congressional silence and passivity.
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> *We continue to be loath, 50 years after Federal Baseball and almost two decades after Toolson, to overturn those cases judicially when Congress, by its positive inaction, has allowed those decisions to stand for so long and, far beyond mere inference and implication, has clearly evinced a desire not to disapprove them legislatively.*
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> *The remedy, if any is indicated, is for congressional, and not judicial, action.* [*Id.* at 283-285 (emphasis added).]

Similarly, Congress has actively considered legislation to reverse the *Bellas Hess* standard. Thus far, it has not enacted legislation, preferring by its "positive inaction" to leave the standard intact. If the states are dissatisfied with *Bellas Hess*, then their alternative is to seek a remedy by "congressional, and not judicial, action." *Id.* at 285.

II. In the Absence of Federal Legislation, This Court Should Adhere to the Physical Presence Standard, Which Protects Interstate Marketers from Burdensome State Tax Collection Obligations.

A. *The Mail Order Industry Is Comprised Largely Of Small Companies That Have Neither The Resources Nor The Sales Volumes To Permit Them To Undertake The Enormous Burdens And Expense Of Use Tax Collection.*

The North Dakota Supreme Court based its opinion, in part, on its perception, unsupported by the record, that the mail order industry is a "goliath", which employs "revolutionary communications abilities and marketing methods which were undreamed of in 1967." (470 N.W.2d at 208.) In seeking to define a new constitutional standard and replace the existing nexus principle, the court pointed to Quill's "extensive computer expertise" as reducing any burden of use tax collection.[14] (*Id.* at 215, n.10.) As discussed below, the North Dakota court is flatly wrong in its depiction of the mail order industry.

1. Today, As In 1967, Most Mail Order Companies Are Relatively Small, And Their Ability To Access National Markets Will Be Seriously Impaired By A Reversal Of The *Bellas Hess* Standard.

In its study, the ACIR concluded that the mail order industry consists primarily of small companies. (*ACIR 1986 Study* at

[14] Quill is a large, business-to-business direct marketer of office supplies. Its business operations are not necessarily typical of the several thousand mail order companies in the United States, most of whom sell directly to consumers, are much smaller than Quill, and lack Quill's level of computerization.

35.) For example, firms with annual sales of less than $250,000 accounted for 56% of the number of mail order companies, while companies with annual sales of less than $5 million accounted for 96% of all mail order companies. (*Id.* at Table 2-4.)

The term "goliath" could not be less appropriate in describing the typical mail order company. In 1987, for example, the average number of employees per mail order company was 17. Bureau of the Census, U.S. Dep't. of Commerce, *1987 Census of Retail Trade*, Geographic Area Series at 17 (1989). Approximately one-third of all mail order companies are sole proprietorships or partnerships. (*Id.* at 12.)

Since its conception in the late 19th century, mail order marketing has attracted start-up companies and local retailers who have seen opportunities for expansion into a national market. Catalog companies have been able to sell to a national market, even though most of them have limited resources, few employees and often are located in rural areas remote from urban centers.[15] Today, contrary to the observations of the North Dakota Court (470 N.W.2d at 209), many small mail order companies continue to sell by traditional marketing methods, and do not use "800" telephone numbers, WATS lines, telefax ordering or direct computer communications.

The Commerce Clause, and the national marketplace it has fostered, enable entrepreneurs to access a national marketplace that has no interior borders or barriers to trade. It is the unitary character of this marketplace that allows even the smallest of retailers with a good product or novel idea to reach a "consumer market" stretching between two oceans.[16] If small companies

[15] For example, Leon Leonwood Bean began the Maine-based mail order company L.L. Bean, Inc. by sending a circular to holders of Maine hunting licenses who resided outside of Maine and offering them a novel product — the rubber-top Hunting Shoe — which outdoorsmen could not get elsewhere. 1987 House Hearings at 154 (Testimony of William T. End.)

[16] The effectiveness of this unitary market can be contrasted to the relative inaccessibility of foreign markets to U.S. mail order companies. For example, although Canada is geographically close and, by population, is a potential market equal to 11% of the U.S. marketplace, it accounts for less than .8% of the

had to confront the prospect, from their first day in business, of filing tax returns on a monthly basis in hundreds of tax jurisdictions, as well as incurring the other burdens of use tax compliance discussed below, they would undoubtedly be deterred from starting (or expanding) their businesses. Indeed, many of the companies already in the mail order business would be forced to discontinue operations.

2. Imposition Of Use Tax Collection Duties On Out-Of-State Mail Order Companies Would Impose A Disproportionate Burden On Them In Comparison To In-State Retailers, And The Expense Would Be Even Greater Today Than In 1967.

The North Dakota Supreme Court gave short shrift to the administrative burdens and expenses mail order companies would encounter in collecting state use taxes. In fact, the administrative burdens and expense which catalog companies would face today are more substantial than those of twenty-four years ago.

There are currently 45 states (plus the District of Columbia) and over 6,100 local governments that impose sales and use taxes. The number of sales and use tax jurisdictions changes

sales of U.S. mail order companies. *Revised Monthly Retail Sales and Inventories*, January 1981 through December 1990, U.S. Depart. of Commerce, Bureau of Census at 4, and *Maclean's* "Ordering Over The Border," p.36 (9/16/91). The postal system is not the barrier, as mail moves easily between the two countries. Moreover, customs duties have been largely eliminated pursuant to the U.S. Canada Free Trade Agreement. The Canadian national GST (a value added tax) and provincial sales and use taxes, however, present a bewildering and difficult compliance barrier to American mail order companies and to their Canadian customers.

It is noteworthy that harmonization of the sales tax laws of the member countries of the European Common Market is an important ingredient of the transformation of Europe into a single market. *See New York Times*, "Europeans Reach Accord on Sales Tax", p. D10 (June 25, 1991). It would be anomalous if North Dakota and other states were able to impose barriers to interstate commerce and thus contribute to Balkanizing our national economy at a time when the European countries, based in large part on the example of the United States, are attempting to remove the obstacles to trade stemming from divergent tax systems.

significantly from year to year.[17] The rates vary considerably among the states and localities, and change regularly and frequently, sometimes with only a short notice.[18]

In almost all instances, sales and use taxes are imposed on the person who purchases or otherwise uses a purchased product in the taxing state. Although the use tax is a direct liability on the retailer's customers, and not on the retailer itself, each jurisdiction places the obligation to collect the sales or use tax on the retailer at the time of sale. Moreover, all state statutes and local ordinances provide that if the retailer does not collect the tax from its customers, then the retailer will be held liable for the tax. In other words, the imposition of direct tax liability is a penalty imposed on the retailer for its failure to conform with tax collection regulations.

Each of the states and the District of Columbia separately administers its sales and use tax system. In addition, in numerous states the local tax jurisdictions separately administer their sales and use taxes,[19] and rates within a state can vary considerably because of differences among the local governments.

While the details of registration and compliance differ from one jurisdiction to the next, there are certain regulatory requirements that retailers must satisfy in all jurisdictions. The retailer must complete a form to register and in some cases pay a fee. It must separately state in its advertisements the applicable tax. The retailer must collect the tax only at the specified use

[17] Attached as Appendix 1 is a summary of the states, counties, municipalities, transit districts and other localities that have assessed sales and use taxes since 1976.

[18] In 1990, the California Legislature, with only 24 days notice, enacted an emergency ¼ percent sales and use tax increase. (Cal. Rev. & Tax Code §§ 6051.1, 6201.1.) Those mail order companies which were registered to collect the California use tax were unable to collect this additional tax for several months because the catalogs they distributed to their California customers already indicated the lower tax rate. Thus, these companies had to pay the additional taxes themselves, and were unable to obtain reimbursement of these increased taxes from their customers, the true taxpayers.

[19] There are approximately 400 local jurisdictions that separately administer their use tax laws. *See* Appendix 3.

tax rate for each jurisdiction and only on non-exempt sales of non-exempt products.

In addition, the retailer is required to file periodic returns and pay estimated or actual use taxes on a regular basis — usually monthly — to each jurisdiction in which it is registered. Moreover, a retailer must retain its records and make its books available for audit.

If *Bellas Hess* were overruled, mail order companies would have to register in a multitude of jurisdictions and would be required to file returns, remit taxes, and conform to a myriad of diverse regulations. The dilemma and hardship mail order companies would encounter was underscored by this Court in *National Bellas Hess, supra*, 386 U.S. at 759-760:

> And if the power of Illinois to impose use tax burdens upon National were upheld, the resulting impediments upon the free conduct of its interstate business would be neither imaginary nor remote. . . . The many variations in rates of tax, in allowable exemptions, and in administrative and record-keeping requirements could entangle National's interstate business in a virtual welter of complicated obligations to local jurisdictions with no legitimate claim to impose "a fair share of the cost to the local government."

The problems of use tax collection in 1991 are even greater than they were in 1967.[20]

First, catalog production would become unbearably expensive and confusing. A mail order company would have to devote valuable catalog space to providing its customers with detailed sales tax instructions for an even greater number of

[20] National Bellas Hess was a large mail order firm with sales of $60 million per year and sales to Illinois residents during the 15 month period in issue of $2,174,744. *National Bellas Hess, Inc.* v. *Dep't. of Revenue*, 386 U.S. 753, 761 (1967). Despite its size, this Court viewed the potential burdens on the retailer as being large and unfair. Most of DMA's current members are far smaller than National Bellas Hess was in 1967.

states and localities than would have been required in 1967.[21] Each mail order catalog would have to inform customers:

> (1) of applicable tax rates for each state and local tax jurisdiction;
>
> (2) of transactions which are exempt (*e.g.*, sales to charitable organizations, schools, government agencies, in *some* states);[22]
>
> (3) of items which are exempt (*e.g.*, some states exempt clothing, food and other consumer products);[23] and
>
> (4) whether to calculate taxes before or after adding shipping and handling charges, since in some states sales and use taxes are imposed on shipping and handling charges in addition to the cost of the product.[24]

[21] In 1967, there were 2,300 local jurisdictions and 12 states which would have required mail order companies to collect the use tax. *National Bellas Hess*, 386 U.S. at 758, n.11, and 759, n.12. Today, the number of jurisdictions has almost tripled. In addition, in 1967 the number of different tax rates among the jurisdictions was only eight. Today, there are 90 different rates. *See* Appendix 2.

[22] Categories of exempt transactions differ greatly among the states (ACIR 1986 Study at 8.)

[23] There is a great disparity among the states regarding tax exempt items. For example, the exemptions for clothing vary broadly among the states. Connecticut exempts "children's clothing" and clothing or footwear that costs less than $75, but excludes clothing that may be worn exclusively during sporting events. (*Conn. Gen State* §§ 7204 176-130(26).) New Jersey exempts clothing and footwear except articles made with fur when fur is the component material of chief value in the article. (N.J. Admin. Code 18:25-6 Reg. 18:24-6.1.) Minnesota exempts clothing, but not footwear or products made of fur if the value of the fur is more than three times the value of the next most valuable component. (Minn. Stat. § 297A.25(8).) Massachusetts exempts clothing and footwear that costs up to $175, special clothing or footwear primarily designed for athletic activity or protective use and which is not normally worn except when so used. (Mass. Gen.L.Ch. 64H(k) § 6.) Rhode Island exempts clothing and footwear, except special clothing or footwear. (R.I. Gen. Laws § 44-18-30(cc).)

[24] Mailing of individualized catalogs for each state is neither a viable economic alternative nor a solution to the problem. A large portion of mail order sales are gifts delivered to recipients in states other than that of the purchaser. Since it is the destination state where the goods are to be used that is entitled to the use tax, it is difficult to determine in advance the applicable tax rates and regulations.

In Congressional hearings, the mail order company L.L. Bean, Inc. estimated that its direct costs in 1987 for devoting catalog space to explain the sales tax rates and exemptions of the 45 states and the District of Columbia alone (*i.e.*, excluding local jurisdictions) would have been $950,000, plus there would have been an opportunity cost for that year of $9.5 million to reallocate catalog space from advertising to sales tax instructions. (1987 House Hearings at 152, 155; testimony of William T. End.) Moreover, there are no computer programs available to track exempt products and transactions for each of the tax jurisdictions. (*See* Responses of Vertex, a company that licenses computer software for sales and use tax collection, to Questions 12 and 15 from the Multistate Tax Commission in Appendix 4; 1987 House Hearings at 161.)[25]

Second, customer confusion in placing orders is likely to increase as a result of consumers attempting to determine whether a particular purchase is taxable and the amount of state and local tax payable. Confusion would also arise when mailing gifts, an important segment of the mail order industry. Consumers would need to determine whether it is the tax rate and exemptions of their own state or that of the gift recipient's state which applies. Many customers will undoubtedly be deterred from placing orders due to the increased complexity of the transaction.

[25] Alan Glazer, President of Bedford Fair Industries of New York, testified before Congress on the problems of a mail order company collecting the tax from multiple jurisdictions:

> They may have 70 different taxing districts in New York State. Villages and counties can all add their percentage on top of that. It goes as high as perhaps eight and a half percent some places in the State . . . *It is easy to say the computer will handle it. Four years and hundreds of thousands of dollars after installing that system, it does not properly calculate sales tax for 70 different taxing districts.* And I would maintain that there is little difference between collecting for 45 states and 70 districts within the State of New York. At least within the State of New York, the items taxed are all the same; it is only the rate that differs. [Testimony Before the Senate Finance Subcommittee on Taxation and Debt Management on S1510-November 15, 1985; emphasis added.]

Third, the post-sale collection costs for mail order companies could be enormous. If a consumer failed to include the tax with his or her payment — despite the mail order vendor's best efforts to inform its customers of applicable taxes — the mail-order company would then be forced to pursue collection of the tax. Post-sale collection costs can be greater than the amount of tax due, particularly in view of the relatively small amount of tax per transaction.[26] Moreover, if the tax is not collected from the customer, the retailer then becomes directly liable for the tax. It is estimated that mail order companies which currently collect use taxes experience underpayment for over nine percent of the taxes due.[27]

[26] The average transaction value for sales by mail is $50. (1987 House Hearings at 132; Testimony of Direct Marketing Association.)

[27] *Id.* at 134. Alan Glazer described to Congress the Hobson's choice a mail order company such as his would confront regarding the collection of sales taxes:

> In the case of a retailer, the customer steps up to the cash register and presents her $20 item, the cash register electronically computes the tax, and there is no way that the title to the goods is going to pass to the consumer until she has perhaps paid $21 for her $20 handbag, for example.
>
> It is quite different in a mail order transaction, whereby a customer sends a check to the mail order company for $20 plus perhaps $3 for shipping and handling, of $23, and if she fails to pay the sales tax, at that point the mail order seller is involved in a Hobson's choice. Should he return the order to the consumer, whereby he would lose the sale? Would he irritate or aggravate the consumer who is expecting rapid shipment and immediate gratification of her desires by sending 2,000 or 3,000 miles away for this $20 blouse, handbag or what have you?
>
> The cost of handling that order on an individual exception basis, as soon as it kicks out of the main stream, the cost to the mail order company immediately exceeds the amount of the sales tax, which if it was 5 percent on the $20 purchase, would be $1. It immediately costs more than $1 to handle that situation.
>
> If you assume that the average well-run mail order company has a pretax profit of approximately 5 percent, and if the sales tax due is 5 percent, as soon as this mail order company must pay that sales tax — and in the end that is what the company would do — they have lost the profit from the sale and they will have to go on to hope to make a profit on another sale. [1987 House Hearings at 130.]

Fourth, a mail order company would have overwhelming (and unending) tax reporting obligations, and it would be subject to audit procedures that vary tremendously among the states. Certainly, most mail order companies lack the resources to manage this task.

The ACIR Study found, "[c]ompliance costs appear to be a particularly serious problem for the numerous small [mail order] firms . . ." (*ACIR 1986 Study* at 6.) The ACIR estimated that compliance costs would be close to four times more for small mail order firms than for large companies. (*ACIR 1986 Study* at 49.) Similarly, a 1987 study, conducted by the public accounting firm of Touche Ross and presented to the House and Senate committees considering proposed federal legislation, found that the smaller the company, the larger the relative cost of collection. 1987 House Hearings at 133. Indeed, firms with sales of less than $5 million cannot even acquire the available computer software programs. (*ACIR 1986 Study* at 67.)

A point-of-sale retailer does not encounter such problems, because it is required to deal with only one tax and one state bureaucracy for any given retail location.[28] The Touche Ross study discussed above noted that mail order marketers on average incur 6 to 7 times the collection costs of retailers that collect sales tax at the cash register. (*See, e.g.*, 1987 House Hearings at 133.)

There are few small mail order firms, especially in these distressed economic times, that could afford these additional and disproportionately burdensome costs. Clearly, many per-

[28] The North Dakota Supreme Court also grounded its decision on its observation that mail order companies have an unfair price advantage over in-state retailers because customers of mail order companies avoid paying any sales or use tax. (470 N.W.2d at 203.) The statement is inaccurate for the following reasons. First, virtually every mail order company imposes a shipping and handling charge, which usually far exceeds the amount of any sales or use tax that would be due on the transaction. Second, consumers are not relieved of any tax obligations as a result of their mail order purchases. The issue is not whether consumers must pay the use tax, but whether out-of-state retailers, as opposed to the states themselves, must collect the tax. Alternative methods for collecting the use tax from their own residents are available to the states, as discussed *infra*.

sons who otherwise might have entered the mail order business would not be willing to assume the additional burden and expense. In short, an industry that has traditionally been characterized by its ease of entry would now present substantial barriers to new entrants. A retailer contemplating the sale of its products across state borders would have to be prepared to devote extensive (and unproductive) resources to satisfy the divergent requirements of a multitude of tax jurisdictions.

Because of their lack of physical presence in the taxing state, out-of-state retailers receive no direct benefits from the state governments for whom they would be acting as tax collectors.[29] Moreover, they have no representation in the political process and cannot politically protect themselves from overbearing obligations imposed on them by state legislatures, such as those contained in the statute passed by the North Dakota legislature.[30]

[29] The North Dakota Supreme Court's claim that municipalities' disposal of catalogs constitutes a benefit to mail order companies is entirely unsubstantiated. In fact, catalogs are being recycled. *See* National Solid Waste Management Association, *At A Glance* (1991) (reporting on studies conducted by Franklin Associates, Ltd. for the U.S. Environmental Protection Agency). Plants for recycling newspapers, catalogs, and other paper products generally pay for their raw materials. Municipalities can obtain additional revenue by recycling the catalogs that their residents discard. Moreover, the North Dakota Supreme Court's decision fails to explain how local government disposal of catalogs is a benefit to direct marketers or a burden which direct marketers impose on municipalities. Although Quill mails catalogs to North Dakota businesses, it is the North Dakota businesses which own the delivered catalogs and decide how long they will retain the catalogs before disposing of them. *SFA Folio Collections, Inc.* v. *Bannon*, 585 A.2d 666, 671 (Conn. 1991), *cert. denied*, 59 U.S.L.W. 3743 (June 17, 1991, n.6) ("Because the catalogs are the property of the Connecticut residents, it is axiomatic that it is the resident who is deriving the benefit from the state and who must contribute to the cost of the disposal."). All of DMA's members provide convenient arrangements for their customers to have their names removed from catalog companies' mailing lists and/or not to have their names made available to other companies. Indeed, DMA provides a "preference service" to consumers by which it will arrange, free of charge, to have a consumer's name removed from all of its members' mailing lists.

[30] Because of the lack of political representation, this Court has looked closely at state legislation that imposes burdens on out-of-state companies. *See Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 767-68, n.2 (1945) ("This Court has often recognized that to the extent . . . the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected.")

B. *The Legal Underpinnings of Bellas Hess Have Not Been Eroded.*

In departing from the *Bellas Hess* physical presence nexus requirement, the North Dakota Supreme Court asserted that the legal landscape has changed in the last twenty-four years. *Bellas Hess*, however, is only one of a long, unbroken, and continuing line of U.S. Supreme Court decisions which have held that a state may not deputize an out-of-state company to collect its sales and use taxes unless that company has a physical business presence in the state.

Recent Court decisions under both the Commerce Clause and Due Process Clause have followed this nexus principle.[31] Although *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977), set forth a new four-prong test for Commerce Clause challenges to state taxation,[32] the Court required as the first prong of the test a "substantial nexus with the taxing State." As the

[31] *See Jimmy Swaggert Ministries* v. *Cal. Bd. of Equalization*, 493 U.S. 378, 110 S.Ct. 688, 699 (1990) (*Bellas Hess* sets forth the proper standard for use tax collection); *Goldberg* v. *Sweet*, 488 U.S. 252, 263 (1989) (under *Bellas Hess* "receipt of mail provides insufficient nexus"); *D.H. Holmes Co., Ltd.* v. *McNamara*, 486 U.S. 24, 33 (1988) (confirms *Bellas Hess* distinction between a company with stores and employees in a state and a mail order company whose "only connection with its . . . customers was by mail or common carrier."); *Mobil Oil Corp.* v. *Comm'n of Taxes of Vermont*, 445 U.S. 425, 436-37 (1986) (citing *Bellas Hess* for proposition that nexus is required under Commerce Clause and Due Process Clause and finding requisite nexus only if "corporation avails itself of the 'substantial privilege of carrying on business within the State' ").

[32] The *Complete Auto* four prong test was established to determine whether a state can tax activities which occur in interstate commerce. Here, however, the question is not whether the transaction itself is subject to tax. There is no dispute that North Dakota has the authority to tax the in-state use of goods purchased by its residents from out-of-state retailers. Instead, this case concerns the question of whether North Dakota can extend its regulatory scheme for collection of use taxes to companies located outside its borders and lacking a physical nexus within the state. *See Bendix Autolite Corp.* v. *Midwesco Enterprises, Inc.*, 486 U.S. 888 (1988); *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, 476 U.S. 573 (1986); and *Allenberg Cotton Co.* v. *Pittman*, 419 U.S. 20 (1974), which set forth a standard for evaluating state regulatory authority under the Commerce Clause that is virtually identical to the *Bellas Hess* physical presence standard.

Court stated in *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 626 (1981), under this first prong, "the interstate business must have a substantial nexus with the State before *any* tax may be levied on it. *See National Bellas Hess, Inc.* v. *Illinois Revenue Dept.*, 386 U.S. 753 (1967)." (Emphasis in original.) Similarly, under the Due Process Clause, there must be a nexus between the out-of-state activities or company being taxed and the taxing state. *See, e.g., Container Corp. of America* v. *Franchise Tax Bd.*, 463 U.S. 159, 165-66 (1983).

The *Bellas Hess* decision created a clear and certain standard which permits both mail order companies and state revenue departments to determine readily the point at which the activities of an out-of-state company cross the nexus-threshold, thereby justifying the imposition of use tax collection responsibilities. In employing that standard, lower courts undertake the conventional judicial process of applying an unambiguous legal principle to specific facts. The North Dakota Supreme Court could have readily employed the *Bellas Hess* standard to determine whether Quill's physical contacts with the State of North Dakota were sufficient to create nexus.[33]

C. *Mail Order Companies Have Relied On The Bellas Hess Doctrine, And Its Reversal Would Expose Mail Order Vendors To Crushing Back-Tax Liabilities For Uncollected Use Taxes.*

Mail order companies have relied on the physical business presence, bright line nexus standard in determining whether they are obligated to collect state use taxes, and, generally, they have

[33] Indeed, the North Dakota Supreme Court itself maintained that it did not have to disregard the *Bellas Hess* standard in order to impose use tax collection obligations on Quill based on the facts before it. It found that Quill maintained property in North Dakota in the form of licensed software it provided to customers to aid in their ordering products. (470 N.W.2d at 216.) As the North Dakota court recognized, under *National Bellas Hess* (386 U.S. at 758), a company's ownership of property in a state can establish the requisite nexus to permit the state to impose use tax collection obligations on the company. The North Dakota Supreme Court's "overruling" of *Bellas Hess* was entirely unnecessary and an improper exercise of its judicial authority.

neither registered nor filed returns in those states where they have lacked a physical presence.[34] If this Court overturns *Bellas Hess* — and does not make its decision purely prospective — then every mail order company which previously declined to collect use taxes would become subject to assessment and back-tax liability for its failure to collect use taxes in past years.[35]

Of course, many companies, especially smaller ones, will not be able to discharge this potential liability and will terminate their businesses or seek protection from their creditors, including state revenue departments, in bankruptcy. The closure of businesses, loss of jobs, depletion of corporate assets, and elimination of valuable contributors and competitors in the retail marketplace will be the tragic consequence suffered by an industry that relied, to its detriment, on a clear line of Supreme Court cases.

Even if the Court were to revise the standard but give it only prospective effect[36] there would still be substantial harm to those companies which remain in the industry. A decision of this Court, even if it is given purely prospective effect, nonetheless becomes effective on the day it is announced. *American*

[34] A thorough discussion of the reliance of the mail order industry on the *Bellas Hess* standard and the effect of such reliance on the principle of *stare decisis* as it applies to this case is contained in the brief of *amicus* Arizona Mail Order Co., *et al.* DMA joins in that brief in its entirety.

[35] It is unlikely that companies could recover from their customers any amounts assessed by the states. First, it may be difficult to locate customers long after the transaction took place. Second, since the average mail order sale is only $50, the amount of tax outstanding per customer is quite small ($2.00 - $4.00). The costs of collection would far exceed the amount to be collected. Third, it is unclear whether mail order companies have the legal right to collect use taxes from customers after the transaction has occurred. Most state sales and use tax statutes authorize collection only at the time the sale takes place.

[36] This case certainly satisfies the three-pronged test for prospective-only application of court decisions set forth in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-07 (1971), and followed in *American Trucking Associations, Inc.* v. *Smith*, U.S. , 110 S. Ct. 2323, 2331 (1990). First, a reversal of *Bellas Hess* clearly establishes new law. Second, prospective application of any new standard created by the reversal of *Bellas Hess* would not retard its operation. Finally, because of the industry's reliance, substantial prejudice to the entire industry would result if any new standard is applied retroactively.

Trucking Associations, Inc. v. *Smith*, U.S. , 110 S.Ct. 2323, 2335 (1990). There is no transition period.

Mail order companies, however, would not be able to begin collecting use taxes immediately; it would take several months for them to be in a position to collect taxes from their customers. Catalogs take months to produce and print. Moreover, catalogs provide prices and terms of sales that are effective for a several-month period. In fairness to their customers, mail order companies would have to forego collecting taxes from consumers for at least several months. During that time, however, the taxes would remain due to the states from the retailers.

D. *A Reversal Of The Bellas Hess Doctrine Is Not Necessary, Because The States Already Have The Means To Collect Any Unpaid Use Taxes Directly From Consumers.*

Most states have failed to make any effort to collect the use tax from their own residents from whom the tax is due; instead, the states summarily seek to have this Court direct the burden of tax collection onto mail order vendors, for whom it would be extremely expensive.[37]

In fact, there are reasonable and efficient means for states to collect the use tax directly from taxpayers. The State of Maine, for example, requires each income tax filer to attest on his or her income tax return the volume of purchases from out-of-state companies and then add the amount of applicable use taxes to the Maine personal income tax return. If no purchase amount is specified, then a scheduled amount of use taxes is automatically added.[38] New Jersey similarly requires reporting of use

[37] The Touche Ross Study found that it would cost mail order companies $.15 for every tax dollar collected. 1987 House Hearings at 133 (Testimony of Direct Marketing Association delivered by Alan Glazer, President of Bedford Fair Industries, Ltd.).

[38] The scheduled amount is 4/100 of 1% of adjusted gross income. In other words, a family with an adjusted gross income of $30,000 would pay $12 as the scheduled amount of use taxes if it chose not to separately itemize out-of-state purchases. 36 M.R.S.A. § 1861-A. The Maine use tax collection scheme, first used for 1990 tax returns, appears to be successful in raising additional use tax

taxes owed on state income tax returns. Direct collection by states of use taxes from their residents would avoid unconstitutional burdens on interstate commerce and also resolve the lost-revenue [39] concerns of the states. To date, most states have not even attempted this alternative.

revenues. As reported in the *Portland [Maine] Press Herald*:

> Lafaver [Maine State Tax Assessor John D. LaFaver] said the early response to the new collection mechanism is encouraging and reinforces his belief that taxpayers will pay what they owe if the obligation is spelled out clearly.

State Rakes In Little-Known Tax With A New Line On its Form, Portland Press Herald, Mar. 6, 1991, at 3D.

[39] Claims of lost tax revenue are frequently over-estimated by state tax authorities because they base their estimates on the total volume of mail order sales nationally. In fact, however, large mail order retailers with stores in numerous states, such as Sears and J.C. Penney, already collect use taxes on their mail order sales because they have nexus in most states. A 1986 study by the economic consulting firm of Robert R. Nathan Associates, the results of which were submitted to Congress, found that there was already use tax collection on 50 percent of the taxable mail order sales by companies with sales greater than $12.5 million. (1987 House Hearings at 136.) Moreover, the claimed lost tax revenue is a diminishing concern. Many retailers who begin solely as mail order marketers, with facilities in only one state, later expand and open retail stores and distribution centers in other states. Once they open such facilities, these retailers commence collection of the applicable sales and use tax on their mail order sales.

Conclusion.

For the foregoing reasons, the judgment below should be reversed.

Dated: November 21, 1991

Respectfully submitted,

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APPENDIX 1

LOCAL GOVERNMENTS WITH SALES TAXES
SELECTED YEARS (1976-1990)

Prepared by U.S. Advisory Commission on Intergovernmental Regulations: *Significant Features of Fiscal Federalism*, Volume 1 (February, 1991)

Table 32

Local Governments with Sales Taxes, Selected Years 1976-1990

State	1990	1989	1988	1987	1986	1984	1981	1979	1976
Alabama (Total)	403	398	389	382	374	353	321	301	265
Municipalities	344	343	334	326	323	310	281	270	
Counties	59	55	55	56	51	43	40	31	
Alaska (Total)	101	101	101	93	97	99	92	93	86
Municipalities	95	95	95	87	91	92	85	86	
Boroughs	6	6	6	6	6	7	7	7	
Arizona (Total)	85	83	81	77	75	70	59	39	—
Municipalities	82	81	79	75	74	70	59	39	38
Counties	3	2	2	2	1	—	—	—	—
Arkansas (Total)*	185	175	142	111	78	60	2	1	1
Municipalities	131	120	100	76	59	44	2	1	
Counties	54	55	42	35	19	16	—	—	
California (Total)*	460	450	446	445	444	443	441	441	438
Municipalities	380	380	380	380	380	380	380	380	
Counties	58	58	58	58	58	58	58	58	
Special Districts	22	12	8	7	6	5	3	3	
Colorado (Total)	236	235	235	225	222	205	183	165	121
Municipalities	198	200	200	193	191	175	159	144	
Counties	37	34	34	31	30	29	23	20	
Transit District	1	1	1	1	1	1	1	1	
Florida (Total)*	23	11							
Counties	21	10	10	0	0	—	—	—	—
Transit District	2	1							
Georgia (Total)*	165	154	155	144	143	133	104	84	16
Municipalities	0	0	0	0	0	0	0	3	
Counties	164	153	154	143	142	132	103	80	
Transit District	1	1	1	1	1	1	1	1	
Idaho*									
Illinois (Total)*	34	1,348	1,383	1,375	1,376	1,353	1,359	1,359	1,342
Municipalities	31	1,278	1,279	1,271	1,272	1,249	1,256	1,256	
Counties	0	68	102	102	102	102	102	102	
Transit Districts	2	2	2	2	2	2	1	1	
Water District	1								
Iowa									
Counties	12	9	5						
Kansas (Total)	180	178	175	168	168	139	40	20	7
Municipalities	119	116	112	108	108	87	35	15	
Counties	61	62	62	60	60	52	5	5	
Louisiana (Total)	325	325	302	302	287	253	251	217	183
Municipalities	193	189	193	192	177	158	152	136	
Parishes	63	64	63	63	63	30	30	21	
School Districts	48	47	46	47	47	65	66	60	
Special Districts	21	25	23	23	23	18	12	7	
Minnesota									
Municipalities	3	3	3	3	1	2	1	1	1
Missouri (Total)*	725	698	674	657	556	487	333	215	152
Municipalities	508	490	479	474	458	406	332	214	
Counties	126	126	120	114	98	81		1	1
Transit Districts	91	82	75	69					
Nebraska									
Municipalities	41	30	25	22	16	12	7	4	—
Nevada (Total)*	7	7	7	7	5	1	1	13	12
Municipalities	—	—	—	—	—	—	—	—	1
Counties	7	7	7	7	5	1	1	12	
New Mexico (Total)	135	134	132	128	134	120	84	99	32
Municipalities	102	101	101	100	101	98	76	93	
Counties	33	33	31	28	33	22	8	6	
New York (Total)	87	85	83	85	81	87	74	70	68
Municipalities	25	30	28	26	27	29	29	25	
Counties	61	54	54	58	53	57	45	45	
Transit District	1	1	1	1	1	1	—	—	

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Table 32 (cont.)

Local Governments with Sales Taxes, Selected Years 1976-1990

State	1990	1989	1988	1987	1986	1984	1981	1979	1976
North Carolina									
Counties	100	100	100	100	100	100	99	99	96
North Dakota									
Municipalities	5	5	4	3	3	—	—	—	—
Ohio (Total)	89	90	88	81	76	65	55	51	33
Counties	83	85	83	79	74	62	52	50	
Transit Districts	4	3	3	2	2	3	3	1	
Islands	2	2	2						
Oklahoma (Total)	494	492	479	473	466	447	398	398	356
Municipalities	470	468	458	457	452	441	398	398	356
Counties	24	24	21	16	14	6	—	—	—
South Carolina*									
South Dakota (Total)	139	135	120	111	107	82	61	46	18
Municipalities	136	132	117	111	107	82	61	46	18
Indian Reservations	3	3	3	—	—	—	—	—	—
Tennessee (Total)	104	106	106	105	105	102	105	104	115
Municipalities	9	11	11	10	10	8	11	12	
Counties	95	95	95	95	95	94	94	92	
Texas (Total)*	1,276	2,610	1,107	1,029	1,032	1,120	949	946	854
Municipalities	1,164	2,521	1,023	1,023	1,026	1,117	921	921	
Counties	105	82	78						
Transit Districts	7	7	6	6	6	3	28	25	
Utah (Total)*	251	260	258	248	248	248	n.a.	230	204
Municipalities	222	225	222	219	219	219	n.a.	201	
Counties	29	29	29	29	29	29	29	29	
Transit Districts	n.a.	6	7						
Virginia (Total)	136	136	136	136	136	136	136	136	133
Municipalities	41	41	41	41	41	41	41	41	
Counties	95	95	95	95	95	95	95	95	
Washington (Total)	307	305	307	307	305	306	302	302	300
Municipalities	268	266	267	268	266	267	264	264	
Counties	39	39	40	39	39	39	38	38	
Wisconsin									
Counties	28	24	18	12	2	—	—	—	—
Wyoming									
Counties	19	19	16	15	14	15	15	13	5
U.S. Total	6,155	8,814	6,955	6,892	6,705	6,492	5,702[e]	5,448[c]	4,893
Percentage Change from Previous Year	30%	26%	1%	1%	1%	14%	5%	11%	

n.a. not available

— not authorized

[e] estimate

[c] correct from last edition

***State Notes**

Arkansas Local governments can levy a 1% sales tax for 12 months to finance Capital Improvements.

California Los Angelos and San Francisco impose a special gross receipts tax. The 22 Special Districts include 19 Transit Districts.

Florida There are 21 local governments that impose the sales tax as a local infrastructure surtax and 2 as a Charter County Transit System surtax.

Georgia Local School Tax—Specified counties are authorized to impose a local sales and use tax for educational purposes. To date, no counties levy the tax.

Idaho Resort cities may, subject to voter approval, adopt, implement, and collect a tax on part or all of the sales subject to the state sales tax.

Illinois On 1/1/90, a portion of the statewide sales tax will be returned to local governments where the goods were purchased. On 9/1/90, home rule cities will be able to impose sales taxes. All taxes will be collected by the state department of revenue. As a result, the number of local government units with sales taxes has decreased. Municipalities impose and collect a use tax.

Iowa Excluded from total. Tax is on a county basis.

Missouri Dedicated for transportation purposes.

Nevada Includes only counties that levy an optional local sales tax to promote tourism or for transportation.

Utah All counties impose sales tax. As of 1/1/90, most recent statistics available from the Utah Department of Revenue.

Source: ACIR staff compilations based on Commerce Clearing House, *State Tax Reporter* (Chicago, November 1990). See also Advisory Commission on Intergovernmental Relations, *Local Revenue Diversification: Local Sales Taxes* (Washington, DC, 1989). See Table 33 for local rates.

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APPENDIX 2

COMBINED SALES AND USE TAX RATES THROUGHOUT THE UNITED STATES

Prepared by Vertex, Inc. (Berwyn Pennsylvania)
November 1, 1991

RESPONSE TO DMA QUESTION NUMBER 2
COMBINED SALES AND USE TAX RATES

Tax Rate	Number of States Imposing Rate	Tax Rate	Number of States Imposing Rate
.01	1	.06313	1
.015	1	.0635	1
.02	1	.06475	1
.03	3	.065	12
.0325	1	.0655	1
.035	2	.06555	1
.0380	1	.066	1
.04	12	.0666	2
.04225	1	.067	2
.0425	1	.06725	1
.0430	1	.0675	8
.045	5	.0680	2
.046	1	.06813	1
.04725	1	.06850	1
.0475	1	.06975	1
.0485	2	.07	18
.04975	1	.0705	1
.05	23	.071	2
.051	2	.07125	1
.05125	2	.07225	1
.05225	1	.0725	7
.0525	3	.0730	2
.05375	1	.07375	1
.05475	1	.07475	1
.055	14	.075	12
.0555	1	.0755	2
.05563	1	.076	2
.0560	1	.07666	1
.05625	1	.0770	3

RESPONSE TO DMA QUESTION NUMBER 2
COMBINED SALES AND USE TAX RATES (cont.)

Tax Rate	Number of States Imposing Rate	Tax Rate	Number of States Imposing Rate
.05688	1	.07725	1
.05725	1	.0775	7
.0575	8	.0780	3
.0580	3	.079	1
.05813	1	.08	10
.0585	2	.08125	1
.05875	1	.082	2
.05938	1	.0825	6
.05975	1	.08375	1
.06	24	.085	6
.06063	1	.0855	1
.061	1	.0875	1
.06125	1	.09	3
.06188	1	.095	2
.06225	1	.10	1
.0625	14		
.0630	1		

TOTAL DIFFERENT COMBINED RATES = 90

APPENDIX 3

LOCALLY ADMINISTERED USE TAX JURISDICTIONS

Prepared by Vertex, Inc. (Berwyn, Pennsylvania)
November 8, 1991

RESPONSE TO MULTISTATE TAX COMMISSION

Questions 1-6, Page 1:
Under current enactments of state and local sales taxes (i.e., not including unused local authority), how many separate sales tax returns would a retailer with a retail outlet in eveyr state and local taxing jurisdiction have to file each month or quarter? (Assume that all retail sales were of taxable items). To which specific jurisdictions in each state would returns have to be sent, i.e., please list the states in which local liability is remitted to the state as part of the state filing (regardless of the type of locality-specific schedule that has to be filed) and all local jurisdictions self-administering their sales taxes. Please supply the current tax rates in each of these jurisdictions.

Response:
A retailer doing business in each taxing district in the United States would have to file approximately 550 sales tax returns per month (assuming all returns were monthly). A retailer collecting use tax in all jurisdictions in the United States would have to file approximately 428 use tax returns per month.

Jurisdiction	**Sales**	**Use**
States & state administered	49	49
Alaska locally administered	93	5
Alabama locally administered	54	34
Arizona locally administered	12	8
Colorado locally administered	41	31
Louisiana locally administered	300	300
Minnesota locally administered	1	1
Total	550	428

Note: Effective 7/1/92, due to a change in filing requirements, Louisiana locals will be collected by 64 parishes rather than the approximately 300 reporting jurisdictions currently required.

Detail information applilcable to this question is shown on Attachment 1 with the exception of the tax rates. The tax rates applicable to all taxing jurisdictions are included in the Vertex National Sales Tax Rate Directory which was previously shipped to your office.

Questions 2, Page 1:
Assuming that nexus were acknowledged, in which of these local jurisdictions would no local use tax collection responsibility exist for an out-of-state direct marketer a) because no local use taxes are imposed; or b) because local use taxes do not apply to inbound interstate sales under current law (again, even were nexus to be acknowledged).

Response:
The information requested in this question is shown on Attachment Number 1.

Question 3, Page 1:
In which states must the base of all local sales and use taxes be identical to the state base by law? In which states (if any) does the base of all local sales/use taxes uniformly differ from the state base, and how does it differ in each such state? In which self-administering local jurisdictions does the jurisdiction have complete autonomy to define its sales/use tax base?

Response:
The information requested in this question is shown on Attachment Number 1.

Question 4, Page 1
What are the current practices with regard to vendor compensation for collection of both state and local sales and use taxes in each state in which the local taxes are state-administered and in each local jurisdiction that self-administers its sales and use taxes? (For example, are there jurisdictions in which compensation is provided for collection of sales taxes but not use taxes?).

Response:
The information requested in this question is shown on Attachment Number 1.

Question 5, Page 1
What restrictions on levels and changes in local sales and use tax rates currently exist (e.g. limited rate options within an overall range, maximum rate, maximum number of rate changes in a given time period, referendum requirements) and where do they exist? Are there similar limitations on making changes in the base of the local tax, even where there is some degree of autonomy to define it?

Response:
The information requested in this question is shown on Attachment Number 1.

RESPONSE TO MULTISTATE TAX COMMISSION

Questions 1–6

Attachment 1

STATES AND STATE ADMINISTERED LOCAL JURISDICITIONS

	STATE	NUMBER OF RETURNS FILED (1)	LOCAL USE TAX (Y/N)	LOCAL TAX BASE (1)	VENDOR'S DISCOUNT SALES	VENDOR'S DISCOUNT USE	RATE RESTRICTIONS	LOCAL EXCEPTION RATE MAX	LOCAL EXCEPTION RATE TIERED
1	ALABAMA	1	(1)	S	(13)	3%			
2	ALASKA		NO STATE TAX						
3	ARIZONA	1	(1)	A	NONE	NONE	YES (1)		YES (1)
4	ARKANSAS	1	Y	S (2)	2%	NONE	YES (2)	YES (1)	
5	CALIFORNIA	1	Y	S	NONE	NONE	YES (2)		
6	COLORADO	1	(2)	S (3)	3.33%	3.33%	7% MAX		
7	CONNECTICUT	1	NO LOCAL TAX		NONE	NONE	NO LOCAL TAX		
8	DELAWARE		NO STATE TAX				NO LOCAL TAX		
9	DC	1	NO LOCAL TAX		1% Max $5,000	NONE	NO LOCAL TAX		
10	FLORIDA	1	N	S	(1)	(1)	YES (4)	YES (4)	
11	GEORGIA	1	Y	S	3%	3%	YES (11)		
12	HAWAII	1	NO LOCAL TAX		NONE	NONE	NO LOCAL TAX		
13	IDAHO	1	NO LOCAL TAX		NONE	NONE	NO LOCAL TAX		
14	ILLINOIS	1	N	S	1.75%	NONE	YES		
15	INDIANA	1	NO LOCAL TAX		1%	NONE	NO LOCAL TAX		
16	IOWA	1	N	S	NONE	NONE	YES (4)		
17	KANSAS	1	N	S (4)	NONE	(14)	YES (5)		
18	KENTUCKY	1	NO LOCAL TAX		1.75% (2)	NONE	NO LOCAL TAX		
19	LOUISIANA	1	Y	A	1.1%	1.1%	YES (6)		
20	MAINE	1	NO LOCAL TAX		NONE	NONE	NO LOCAL TAX		
21	MARYLAND	1	NO LOCAL TAX		1.2%	1.2%	NO LOCAL TAX		
22	MASSACHUSETTS	1	NO LOCAL TAX		NONE	NONE	NO LOCAL TAX		
23	MICHIGAN	1	NO LOCAL TAX		(4)	(4)	NO LOCAL TAX		
24	MINNESOTA	3	Y	A	NONE	NONE			
25	MISSISSIPPI	2	N	S	2% Max $50(5)	2% Max $50(5)			
26	MISSOURI	1	N	S	2%	NONE	YES (7)		
27	MONTANA		NO STATE TAX				NO LOCAL TAX		
28	NEBRASKA	1	Y	S	1.5% (8)	1.5% (8)	YES (7)		
29	NEVADA	1	Y	S	1.25%	1.25%	YES (8)		
30	NEW HAMPSHIRE		NO STATE TAX				NO LOCAL TAX		
31	NEW JERSEY	1	NO LOCAL TAX		NONE	NONE	NO LOCAL TAX		
32	NEW MEXICO	1	N	S	NONE	NONE	YES (9)		
33	NEW YORK	1	Y	S	NONE	NONE	YES (10)		
34	NORTH CAROLINA	1	Y	S	NONE	NONE	YES (11)		
35	NORTH DAKOTA	1	Y	A	1.5% (12)	NONE	YES (12)	YES (5)	
36	OHIO	1	Y	S	1.5%	1.5%	YES (13)		
37	OKLAHOMA	1	(1)	S	2.25%	(7)	YES (5)		
38	OREGON		NO STATE TAX				NO LOCAL TAX		
39	PENNSYLVANIA	1	N	S	1%	NONE	YES (4)		
40	RHODE ISLAND	1	NO LOCAL TAX		NONE	NONE	NO LOCAL TAX		
41	SOUTH CAROLINA	1	Y	S	3% (8)	3% (8)	YES (4)		
42	SOUTH DAKOTA	1	Y	S (5)	1.5% Max $70	NONE	YES (14)		
43	TENNESSSEE	1	Y	S	2% (9)	2% (9)		YES (2)	
44	TEXAS	1	Y	S	.5%	.5%	YES (15)		
45	UTAH	1	Y	S	NONE	NONE	YES (16)	YES (3)	
46	VERMONT	1	NO LOCAL TAX		NONE	NONE	NO LOCAL TAX		
47	VIRGINIA	1	Y	S	(10)	(10)	YES (4)		
48	WASHINGTON	1	Y	S	NONE	NONE	YES (17)		
49	WEST VIRGINIA	1	NO LOCAL TAX		NONE	NONE	NO LOCAL TAX		
50	WISCONSIN	1	Y	S	(11)	(11)	YES (18)		
51	WYOMING	1	Y	S	NONE	NONE	YES (2)		
	Totals	49							

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FOOTNOTES TO STATE SCHEDULE

NUMBER OF RETURNS

(1) A return may encompass more one more different schedules

LOCAL USE TAXES

(1) Local use taxes may or may not apply depending on the specific local statute. See the Vertex National SalesTax Rate Director for details.

(2) State administered jurisdictions do not impose use taxes. Locally administered jurisdictions may impose use taxes.

LOCAL TAX BASE

(1) S = Same as state D = Uniformally Different From the State A = Autonomous

(2) The Texarkana tax base can differ from the state base.

(3) Basically the same as the state except food and machinery tax bases can vary.

(4) Basically the same as the state except certain parts for agricultural machinery are exempt from the local tax.

VENDOR'S DISCOUNT

(1) 2.5% of first $1,200 and .83% of excess. Mail order dealers can negotiate rates not to exceed 10%.

(2) 1% on amounts over $1,000.

(3) Reserved

(4) Depends on when the tax is paid. Before the 7th of the month, .75% between 7th and 15th, .5%. Maximum of $15,000.

(5) Maximum of $600 per year per location.

(6) 1.5% for tax amounts less than $1,000, .5% on excess.

(7) Based on seller's home state's discount rate — max of 2.25%.

(8) 3% for tax amounts less than $100, 2% on excess to a maximum of $10,000 per fiscal year.

(9) 2% for tax amounts less than $2,500, 1.15% on excess.

(10) 3.43% for tax amounts less than $62,500, 2.57% for tax amounts between $62,500 and $208,000, 1.71% on excess
(11) 2% for tax amounts less than $10,000, 1% for tax amounts between $10,000 and 20,000, .5% on excess per fiscal year.
(12) Maximum of $85. Cities have their own discount rates.
(13) 5% for sales tax amounts less than $100, 2% on excess.
(14) Discount applicable if seller is located in Colorado, Missouri, Nebraska, or Oklahoma.

RATE RESTRICTIONS

(1) County rates cannot exceed 10% of the state tax.
(2) County rates cannot exceed 2%.
(3) Reserved
(4) The maximum local rate is 1%.
(5) Maximum rates are based on the population of local jurisdictions.
(6) City taxes cannot exceed 2.5% in most cities and 3.5% in a few cities. Parish taxes cannot exceed 2%.
(7) Maximum city rates cannot exceed 1.5%.
(8) Maximum county rates cannot exceed 2.75%.
(9) New Mexico has a number of county and city sales (gross receipts) taxes that each have maximum rates.
(10) Maximum city ore county is 4.25%.
(11) Maximum county rate is 2%.
(12) Maximum city rate is 1%.
(13) Maximum county rate is 1.5%. Maximum transit rate is 1.5%.
(14) Maximum city rate is 2%.
(15) The maximum combined rate cannot exceed 8.25%.
(16) Maximum city or county rate is 1%. Maximum Resort Community Tax rate is 1%.
(17) Maximum city or county rate is 1.1%. Maximum transit rate is .6%.
(18) Maximum county rate is .5%.

MAXIMUM RATES

(1) The maximum tax amount in most cities is $25 per each 1% of city tax rate.
(2) Maximum tax amounts vary by city and county. See the Vertex National Sales Tax Rate Directory for details.
(3) The maximum taxable amount for Resort Communities Tax purpsoes is $2,500.
(4) The maximum taxable amount for county tax purpöses is $5,000.
(°5) The maximum tax amount in most cities is $25.

TIERED RATES

(1) A number of Arizona cities have tiered rates. See the Vertex National Sales Tax Rate Director for details.

LOCALLY ADMINISTERED JURISDICTIONS – ALABAMA

	NUMBER OF RETURNS FILED	USE TAX APPLICAABLE (Y/N)	LOCAL TAX BASE	VENDOR'S DISCOUNT SALES	VENDOR'S DISCOUNT USE	RATE RESTRICTIONS	EXCEPTION RATES MAX	EXCEPTION RATES TIERED
				COUNTIES				
Jefferson	1	Y	S	5% / 2% (1)	3%	(2)	NONE	NONE
Madison	1	Y	S	5% / 2% (1)	5% / 2% (1)	(2)	NONE	NONE
Mobile	1	Y	S	NONE	NONE	(2)	NONE	NONE
St. Clair	1		S	2%		(2)	NONE	NONE
Tuscaloosa	1	Y	S	5% / 2% (1)	5% / 2% (1)	(2)	NONE	NONE
Walker	1		S	2%		(2)	NONE	NONE
				CITIES				
Adamsville	1	Y	S	5% / 2% (1)	5% / 2% (1)	(2)	NONE	NONE
Anniston	1	Y	S	(2)	(2)	(2)	NONE	NONE
Banks	1		S	(2)		(2)	NONE	NONE
Birmingham	1	Y	S	NONE	NONE	(2)	NONE	NONE
Brilliant	1	Y	S	(2)	(2)	(2)	NONE	NONE
Chickasaw	1	Y	S	NONE	NONE	(2)	NONE	NONE
Childersburg	1		S	(2)		(2)	NONE	NONE
Cordova	1		S	3%		(2)	NONE	NONE
Creola	1	Y	S	3%	3%	(2)	NONE	NONE
Daphne	1	Y	S	(2)	(2)	(2)	NONE	NONE
Decatur	1		S	3%		(2)	NONE	NONE
Detroit	1	Y	S	5% / 2% (1)	5% / 2% (1)	(2)	NONE	NONE
Ethelsville	1		S	(2)		(2)	NONE	NONE
Fairfield	1	Y	S	(2)	(2)	(2)	NONE	NONE
Flint City	1		S	(2)		(2)	NONE	NONE
Fyffe	1		S	5% / 2% (1)		(2)	NONE	NONE
Glen Allen	1		S	(2)		(2)	NONE	NONE
Graysville	1	Y	S	(2)	(2)	(2)	NONE	NONE
Gulf Shores	1	Y	S	(2)	(2)	(2)	NONE	NONE
Hartselle	1		S	(2)		(2)	NONE	NONE
Henager	1		S	(2)		(2)	NONE	NONE
Homewood	1	Y	S	1.5%	1.5%	(2)	NONE	NONE
Hoover	1	Y	S	2%	2%	(2)	NONE	NONE
Hueytown	1		S	(2)		(2)	NONE	NONE
Huntsville	1	Y	S	5% / 2% (1)	5% / 2% (1)	(2)	NONE	NONE
Irondale	1	Y	S	1.5%	1.5%	(2)	NONE	NONE
Jasper	1		S	5% / 2% (1)		(2)	NONE	NONE
Madison	1	Y	S	(2)	(2)	(2)	NONE	NONE
Mobile	1	Y	S	3%	NONE	(2)	NONE	NONE
Montgomery	1	Y	S	(2)	(2)	(2)	NONE	NONE
Mountain Brook	1	Y	S	1.5%	1.5%	(2)	NONE	NONE
North Port	1	Y	S	5% / 2% (1)	5% / 2% (1)	(2)	NONE	NONE
Orrville	1		S	5% / 2% (1)		(2)	NONE	NONE
Pelham	1	Y	S	(2)	(2)	(2)	NONE	NONE
Pell City	1	Y	S	(2)	(2)	(2)	NONE	NONE
Piedmont	1	Y	S	(2)	(2)	(2)	NONE	NONE
Rainsville	1		S	5% / 2% (1)		(2)	NONE	NONE
Roanoke	1	Y	S	(2)	(2)	(2)	NONE	NONE
Robertsdale	1	Y	S	(2)	(2)	(2)	NONE	NONE
Rockford	1	Y	S	3%	3%	(2)	NONE	NONE
Saraland	1		S	NONE		(2)	NONE	NONE
Satsuma	1		S	3%		(2)	NONE	NONE
Southside	1	Y	S	(2)	(2)	(2)	NONE	NONE
Trinity	1		S	3%		(2)	NONE	NONE
Tuscaloosa	1	Y	S	5% / 2% (1)	5% / 2% (1)	(2)	NONE	NONE
Vestavia Hills	1	Y	S	5% / 2% (1)	5% / 2% (1)	(2)	NONE	NONE
Webb	1		S	5% / 2% (1)		(2)	NONE	NONE
Wilmer	1	Y	S	3%	3%	(2)	NONE	NONE
	64	34						

(1) 5% for the first $100 in tax, 2% on excess.
(2) Unknown

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LOCALLY ADMINISTERED JURISDICTIONS – ALASKA

	NUMBER OF RETURNS FILED	USE TAX APPLICAABLE (Y/N)	LOCAL TAX BASE	VENDOR'S DISCOUNT SALES	VENDOR'S DISCOUNT USE	RATE RESTRICTIONS	EXCEPTION RATES MAX	EXCEPTION RATES TIERED
				COUNTIES				
Haines	1		A	(1)		(1)	(1)	(1)
Juneau	1		A	(1)		(1)	(1)	(1)
Kenai Peninsula	1		A	(1)		(1)	(1)	(1)
Ketchiken Gateway	1		A	(1)		(1)	(1)	(1)
	1			CITIES				
Aklachak	1		A	(1)		(1)	(1)	(1)
Alakanuk	1	Y	A	(1)	(1)	(1)	(1)	(1)
Ambler	1		A	(1)		(1)	(1)	(1)
Angoon	1		A	(1)		(1)	(1)	(1)
Atmautluak	1		A	(1)		(1)	(1)	(1)
Barrow	1		A	(1)		(1)	(1)	(1)
Bethel	1		A	(1)		(1)	(1)	(1)
Brevig Mission	1		A	(1)		(1)	(1)	(1)
Buckland	1		A	(1)		(1)	(1)	(1)
Chefornak	1		A	(1)		(1)	(1)	(1)
Chevak	1		A	(1)		(1)	(1)	(1)
Clarks Point	1		A	(1)		(1)	(1)	(1)
Cordova	1		A	(1)		(1)	(1)	(1)
Craig	1		A	(1)		(1)	(1)	(1)
Deering	1		A	(1)		(1)	(1)	(1)
Dillingham	1		A	(1)		(1)	(1)	(1)
Diomede	1		A	(1)		(1)	(1)	(1)
Douglas	1		A	(1)		(1)	(1)	(1)
Eek	1		A	(1)		(1)	(1)	(1)
Elim	1		A	(1)		(1)	(1)	(1)
Emmonak	1		A	(1)		(1)	(1)	(1)
Fort Yukon	1		A	(1)		(1)	(1)	(1)
Galena	1		A	(1)		(1)	(1)	(1)
Gambell	1		A	(1)		(1)	(1)	(1)
Haines	1		A	(1)		(1)	(1)	(1)
Homer	1		A	(1)		(1)	(1)	(1)
Hoonah	1		A	(1)		(1)	(1)	(1)
Hooper Bay	1		A	(1)		(1)	(1)	(1)
Juneau	1		A	(1)		(1)	(1)	(1)
Kake	1		A	(1)		(1)	(1)	(1)
Kenai	1		A	(1)		(1)	(1)	(1)
Ketchikan	1		A	(1)		(1)	(1)	(1)
Kiana	1		A	(1)		(1)	(1)	(1)
King Cove	1	Y	A	(1)	(1)	(1)	(1)	(1)
Kivalina	1		A	(1)		(1)	(1)	(1)
Klawok	1		A	(1)		(1)	(1)	(1)
Kodiak	1		A	(1)		(1)	(1)	(1)
Kodiak Station	1		A	(1)		(1)	(1)	(1)
Kotlik	1		A	(1)		(1)	(1)	(1)
Kotzebue	1		A	(1)		(1)	(1)	(1)
Koyuk	1		A	(1)		(1)	(1)	(1)
Manokotak	1		A	(1)		(1)	(1)	(1)
Mekoryuk	1		A	(1)		(1)	(1)	(1)
Mountain Village	1	Y	A	(1)	(1)	(1)	(1)	(1)
Napaklak	1		A	(1)		(1)	(1)	(1)
Nenana	1		A	(1)		(1)	(1)	(1)
Netwok	1		A	(1)		(1)	(1)	(1)
Nightmute	1		A	(1)		(1)	(1)	(1)
Nome	1		A	(1)		(1)	(1)	(1)
Noorvik	1		A	(1)		(1)	(1)	(1)
North Pole	1		A	(1)		(1)	(1)	(1)
Nuiqsut	1		A	(1)		(1)	(1)	(1)
Nunapitchuk	1		A	(1)		(1)	(1)	(1)
Ouzinkie	1		A	(1)		(1)	(1)	(1)
Palmer	1		A	(1)		(1)	(1)	(1)
Pelican	1		A	(1)		(1)	(1)	(1)
Petersburg	1	Y	A	(1)	(1)	(1)	(1)	(1)
Pilot Station	1		A	(1)		(1)	(1)	(1)
Port Alexander	1		A	(1)		(1)	(1)	(1)
Quinhagak	1		A	(1)		(1)	(1)	(1)
Saint Michael	1		A	(1)		(1)	(1)	(1)
	66	4						

(1) Unkown

ALASKA (Con't)	NUMBER OF RETURNS FILED	USE TAX APPLICAABLE (Y/N)	LOCAL TAX BASE	VENDOR'S DISCOUNT		RATE RESTRICTIONS	EXCEPTION RATES	
				SALES	USE		MAX	TIERED
Saint Paul Island	1		A	(1)		(1)	(1)	(1)
Sand Point	1		A	(1)		(1)	(1)	(1)
Sevoonga	1		A	(1)		(1)	(1)	(1)
Saxman	1		A	(1)		(1)	(1)	(1)
Scammon Bay	1		A	(1)		(1)	(1)	(1)
Selawik	1		A	(1)		(1)	(1)	(1)
Seldovia	1		A	(1)		(1)	(1)	(1)
Seward	1		A	(1)		(1)	(1)	(1)
Shaktoolik	1		A	(1)		(1)	(1)	(1)
Shishmaref	1		A	(1)		(1)	(1)	(1)
Shungnak	1		A	(1)		(1)	(1)	(1)
Sitka	1		A	(1)		(1)	(1)	(1)
Skagway	1		A	(1)		(1)	(1)	(1)
Soldotna	1		A	(1)		(1)	(1)	(1)
Stebbins	1		A	(1)		(1)	(1)	(1)
Tanana	1		A	(1)		(1)	(1)	(1)
Teller	1		A	(1)		(1)	(1)	(1)
Tenakee Springs	1		A	(1)		(1)	(1)	(1)
Toglak	1		A	(1)		(1)	(1)	(1)
Tokeook Bay	1		A	(1)		(1)	(1)	(1)
Tununa	1		A	(1)		(1)	(1)	(1)
Unalakleet	1		A	(1)		(1)	(1)	(1)
Unalaska	1	Y	A	(1)	(1)	(1)	(1)	(1)
Wales	1		A	(1)		(1)	(1)	(1)
Whittier	1		A	(1)		(1)	(1)	(1)
Wrangell	1		A	(1)		(1)	(1)	(1)
Yakutat	1		A	(1)		(1)	(1)	(1)
	27	1						

(1) Unknown

LOCALLY ADMINISTERED JURISDICTIONS – ARIZONA

	NUMBER OF RETURNS FILED	USE TAX APPLICAABLE (Y/N)	LOCAL TAX BASE	VENDOR'S DISCOUNT SALES	VENDOR'S DISCOUNT USE	RATE RESTRICTIONS	EXCEPTION RATES MAX	EXCEPTION RATES TIERED
Chandler	1	Y	A	NONE	NONE	(1)	NONE	NONE
Flagstaff	1		A	NONE		(1)	NONE	NONE
Glendale	1	Y	A	NONE	NONE	(1)	NONE	NONE
Mesa	1	Y	A	NONE	NONE	(1)	NONE	NONE
Nogales	1		A	NONE		(1)	NONE	NONE
Patagonia	1		A	NONE		(1)	NONE	NONE
Peoria	1	Y	A	NONE	NONE	(1)	NONE	NONE
Phoenix	1	Y	A	NONE	NONE	(1)	NONE	NONE
Prescott	1	Y	A	NONE	NONE	(1)	NONE	NONE
Scottsdale	1	Y	A	NONE	NONE	(1)	NONE	NONE
Tempe	1	Y	A	NONE	NONE	(1)	NONE	NONE
Tucson	1		A	NONE		(1)	NONE	NONE
	12	6						

(1) Unknown

LOCALLY ADMINISTERED JURISDICTIONS – COLORADO

	NUMBER OF RETURNS FILED	USE TAX APPLICAABLE (Y/N)	LOCAL TAX BASE	VENDOR'S DISCOUNT SALES	VENDOR'S DISCOUNT USE	RATE RESTRICTIONS	EXCEPTION RATES MAX	EXCEPTION RATES TIERED
Alamosa	1	Y	A	5%	NONE	(1)	NONE	NONE
Arvada	1	Y	A	3% MAX $100	NONE	(1)	NONE	NONE
Aurora	1	Y	A	.5%	NONE	(1)	NONE	NONE
Avon	1	Y	A	NONE	NONE	(1)	NONE	NONE
Boulder	1	Y	A	1.5%	NONE	(1)	NONE	NONE
Breckenridge	1		A	3.33%		(1)	NONE	NONE
Canon City	1		A	3.33%		(1)	NONE	NONE
Central City	1		A	3.33%		(1)	NONE	NONE
Cherry Hills Village	1		A	NONE		(1)	NONE	NONE
Colorado Springs	1	Y	A	3%	NONE	(1)	NONE	NONE
Commerce City	1	Y	A	2%	NONE	(1)	NONE	NONE
Cortez	1	Y	A	3.33%	NONE	(1)	NONE	NONE
Delta	1	Y	A	NONE	NONE	(1)	NONE	NONE
Denver	1	Y	A	1%	NONE	(1)	NONE	NONE
Durango	1	Y	A	3.33%	NONE	(1)	NONE	NONE
Edgewater	1	Y	A	3%	NONE	(1)	NONE	NONE
Englewood	1	Y	A	1.6%	NONE	(1)	NONE	NONE
Fort Collins	1	Y	A	1%	NONE	(1)	NONE	NONE
Glendale	1		A	2.6%		(1)	NONE	NONE
Glenwood Springs	1	Y	A	3.33%	NONE	(1)	NONE	NONE
Golden	1	Y	A	2.5%	NONE	(1)	NONE	NONE
Grand Junction	1	Y	A	3.33%	NONE	(1)	NONE	NONE
Greeley	1	Y	A	NONE	NONE	(1)	NONE	NONE
Greenwood Village	1		A	NONE		(1)	NONE	NONE
La Junta	1	Y	A	3%	NONE	(1)	NONE	NONE
Lafayette	1	Y	A	2.5%	NONE	(1)	NONE	NONE
Lakewood	1	Y	A	1%	NONE	(1)	NONE	NONE
Lamar	1	Y	A	3.33%	NONE	(1)	NONE	NONE
Larkspur	1		A	NONE		(1)	NONE	NONE
Littleton	1	Y	A	2.5%	NONE	(1)	NONE	NONE
Longmont	1	Y	A	3%	NONE	(1)	NONE	NONE
Montrose	1	Y	A	1.33%	NONE	(1)	NONE	NONE
Mount Crested Butte	1		A	3.33%		(1)	NONE	NONE
Northglenn	1	Y	A	1%	NONE	(1)	NONE	NONE
Pueblo	1	Y	A	3.3%	NONE	(1)	NONE	NONE
Rifle	1	Y	A	NONE	NONE	(1)	NONE	NONE
Steamboat Springs	1		A	1%		(1)	NONE	NONE
Thornton	1	Y	A	1.5%	NONE	(1)	NONE	NONE
Vail	1		A	NONE		(1)	NONE	NONE
Westminster	1	Y	A	2.5%	NONE	(1)	NONE	NONE
Wheat Ridge	1	Y	A	2%	NONE	(1)	NONE	NONE
	41		31					

(1) Unkown

LOCALLY ADMINISTERED JURISDICTIONS – LOUISIANA

	NUMBER OF RETURNS FILED	USE TAX APPLICAABLE (Y/N)	LOCAL TAX BASE	VENDOR'S DISCOUNT SALES	VENDOR'S DISCOUNT USE	RATE RESTRICTIONS	EXCEPTION RATES MAX	EXCEPTION RATES TIERED
			PARISHES (COUNTIES)					
Acadia	(1)	Y	A	2%	(2)	NONE	NONE	NONE
Allen	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Ascension	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Assumption	(1)	Y	A	2%	(2)	NONE	NONE	NONE
Avoyelles	(1)	Y	A	2%	(2)	NONE	NONE	NONE
Beauregard	(1)	Y	A	1.5%	(2)	NONE	NONE	NONE
Bienville	(1)	Y	A	2%	(2)	NONE	NONE	NONE
Bossier	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Caddo	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Calcasieu	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Caldwell	(1)	Y	A	2%	(2)	NONE	NONE	NONE
Catahoula	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Claiborne	(1)	Y	A	2%	(2)	NONE	NONE	NONE
Concordia	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Desoto	(1)	Y	A	1.5%	(2)	NONE	NONE	NONE
East Baton Rouge	(1)	Y	A	1%	(2)	NONE	NONE	NONE
East Carroll	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
East Feliciana	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Evangeline	(1)	Y	A	2%	(2)	NONE	NONE	NONE
Franklin	(1)	Y	A	2%	(2)	NONE	NONE	NONE
Grant	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Iberia	(1)	Y	A	1%	(2)	NONE	NONE	NONE
Iberville	(1)	Y	A	1.5%	(2)	NONE	NONE	NONE
Jackson	(1)	Y	A	2%	(2)	NONE	NONE	NONE
Jefferson Davis	(1)	Y	A	2%	(2)	NONE	NONE	NONE
Jefferson	(1)	Y	A	1%	(2)	NONE	NONE	NONE
La Salle	(1)	Y	A	1.5%	(2)	NONE	NONE	NONE
Lafayette	(1)	Y	A	2%	(2)	NONE	NONE	NONE
Lafourche	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Lincoln	(1)	Y	A	2%	(2)	NONE	NONE	NONE
Livingston	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Madison	(1)	Y	A	2%	(2)	NONE	NONE	NONE
Morehouse	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Natchitoches	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Orleans	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Ouachita	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Plaquemines	(1)	Y	A	2%	(2)	NONE	NONE	NONE
Pointe Coupee	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Rapides	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Red River	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Richland	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Sabine	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
St. Bernard	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
St. Charles	(1)	Y	A	2%	(2)	NONE	NONE	NONE
St. Helena	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
St. James	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
St. John the Baptist	(1)	Y	A	2%	(2)	NONE	NONE	NONE
St. Landry	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
St. Martin	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
St. Mary	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
St. Tammany	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Tangipahoa	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Tensas	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Terrebonne	(1)	Y	A	2%	(2)	NONE	NONE	NONE
Union	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Vermilion	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Vernon	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Washington	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Webster	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
West Baton Rouge	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
West Carroll	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
West Feliciana	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Winn	(1)	Y	A	(2)	(2)	NONE	NONE	NONE

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(2) Unkown

LOUISIANA (Con't)	NUMBER OF RETURNS FILED	USE TAX APPLICAABLE (Y/N)	LOCAL TAX BASE	VENDOR'S DISCOUNT SALES	VENDOR'S DISCOUNT USE	RATE RESTRICTIONS	EXCEPTION MAX	EXCEPTION MAX
			CITIES					
Abbeville	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Abita Springs	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Albany	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Alexandria	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Amite	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Angie	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Arcadia	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Arnaudville	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Baker	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Baldwin	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Ball	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Basile	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Bastrop	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Baton Rouge	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Benton	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Bernice	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Berwick	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Bogalusa	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Bonita	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Bossier City	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Breaux Bridge	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Broussard	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Bunkie	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Campti	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Cankton	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Carencro	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Castor	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Centerville	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Chataignier	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Church Point	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Clarence	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Colfax	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Collinston	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Columbia	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Cotton Valley	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Cottonport	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Coushatta	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Covington	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Crowley	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Cullen	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
De Quincy	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
De Ridder	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Delcambre	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Delhi	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Delta	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Denham Springs	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Dixie Inn	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Donaldsonville	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Dubach	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Duson	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
East Hodge	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Elizabeth	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Elton	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Erath	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Eros	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Estherwood	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Eunice	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Farmerville	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Ferriday	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Florien	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Folsom	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Fordoche	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Franklin	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Franklinton	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Georgetown	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Gibsland	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Gilbert	(1)	Y	A	(2)	(2)	NONE	NONE	NONE

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(2) Unkown

LOUISIANA (Con't)	NUMBER OF RETURNS FILED	USE TAX APPLICAABLE (Y/N)	LOCAL TAX BASE	VENDOR'S DISCOUNT SALES	VENDOR'S DISCOUNT USE	RATE RESTRICTIONS	EXCEPTION MAX	EXCEPTION MAX
Glenmora	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Golden Meadow	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Gonzales	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Goosport	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Grambling	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Gramercy	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Grand Coteau	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Greensburg	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Greenwood	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Gueydan	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Hall Summit	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Hammond	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Haughton	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Haynesville	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Henderson	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Hodge	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Homer	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Hornbeck	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Independence	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Iota	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Iowa	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Jeanerette	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Jena	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Jennings	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Jonesboro	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Junction City	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Kaplan	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Kentwood	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Kinder	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Krotz Springs	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Lafayette	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Lake Arthur	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Lake Providence	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Lecompte	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Leesville	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Livingston	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Livonia	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Lockport	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Logansport	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Loreauville	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Lutcher	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Madisonville	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Mamou	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Mandeville	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Mangham	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Mansfield	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Mansura	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Many	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Marion	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Marksville	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Maurice	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Melville	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Mer Rouge	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Mermentau	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Merryville	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Minden	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Monroe	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Mooringsport	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Moreauville	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Morgan City	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Morganza	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Morse	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Napoleonville	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Natchez	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Natchitoches	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
New Iberia	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
New Llano	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
New Orleans Internat	(1)	Y	A	(2)	(2)	NONE	NONE	NONE

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(2) Unkown

LOUISIANA (Con't)	NUMBER OF RETURNS FILED	USE TAX APPLICAABLE (Y/N)	LOCAL TAX BASE	VENDOR'S DISCOUNT SALES	VENDOR'S DISCOUNT USE	RATE RESTRICTIONS	EXCEPTION MAX	EXCEPTION MAX
New Orleans	(1)	Y	A	1%	1%	NONE	NONE	NONE
New Roads	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
North Hodge	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Oak Grove	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Oakdale	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Oberlin	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Oil City	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Opelousas	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Parks	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Patterson	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Pearl River	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Pine Prairie	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Pineville	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Plain Dealing	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Plaucheville	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Pleasant Hill	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Pollock	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Ponchatoula	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Port Barre	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Rayne	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Rayville	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Richmond	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Richwood	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Ringgold	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Robeline	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Rodessa	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Roseland	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Rosepine	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Ruston	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Saint Francisville	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Saint Martinville	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Sarepta	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Scott	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Shreveport	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Sibley	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Simmesport	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Slidell	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Sorrento	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
South Mansfield	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Springfield	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Springhill	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Starlington	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Stonewall	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Sulphur	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Sun	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Sunset	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Tallulah	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Tangipahoa	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Thibodaux	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Ticktaw	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Varnado	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Vidalia	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Ville Platte	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Vinton	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Vivian	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Walker	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Washington	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Welsh	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
West Monroe	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Westlake	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Winnfield	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Winnsboro	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Wisner	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Youngsville	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Zachary	(1)	Y	A	(2)	(2)	NONE	NONE	NONE
Zwolle	(1)	Y	A	(2)	(2)	NONE	NONE	NONE

(1) There are approximately 300 separate local returns that must be filed in Louisiana. Effective 7/1/92, taxes will be collected at the parish level, thereby reducing the number of filing jurisdictions to 64.

(2) Unkown

BEST AVAILABLE COPY

LOCALLY ADMINISTERED JURISDICTIONS – MINNESOTA

	NUMBER OF RETURNS FILED	USE TAX APPLICAABLE (Y/N)	LOCAL TAX BASE	VENDOR'S DISCOUNT		RATE RESTRICTIONS	EXCEPTION RATES	
				SALES	USE		MAX	TIERED
Duluth	1	Y	S	NONE	NONE	NONE	NONE	NONE

APPENDIX 4

LACK OF SOFTWARE TO PERMIT DETERMINATION OF TAX EXEMPT STATUS PRODUCTS AND TAX EXEMPT STATUS OF ORGANIZATION

Prepared by Vertex, Inc. (Berwyn, Pennsylvania)
November 8, 1991

Question 11, Page 3.
Is the claim of 97 percent accuracy for zip code plus city name in this same article based on a 5 or 9-digit zip code? If the former, can you offer an estimate of the accuracy of using the 9 digit code? I ask, of course, because there are relatively inexpensive CD ROM databases that will assign 9 digit zip codes and carrier route nbumbers to street addresses. (In question 7 I already asked if the SalesTax Compliance System includes such a feature).

Response:
The claim of 97 percent accuracy is based on the 5 digit zip code. Vertex is working with software companies that provide list processing services and which have databases of street address records. We are mutually working toward adding the Vertex GeoCode to the List Processing Company's data base records so that each street address will effectively have a GeoCode assigned thereto.

Question 12, Page 3.
Does Vertex or anyone else of whom you are aware have available or under development software that could designate consumer items (e.g., clothing, food, publications) as taxable or tax exempt in various states on the basis of bar coding assigned by manufacturers?

Response:
We are not aware of any such software. Vertex is, however, in the final development of an enhancement to the SalesTax software that will provide the taxability of the above itgems by state.

To use the new software, the user would pass the product code for clothing (as an example) and the calculation module will tax according to the indicators on the file.

Question 13, Page 3.
Does Vertex, any of its clients, or anyone else of whom you are aware have available or under development software that would link geographic coding and rate coding software to printing and binding software, to allow for ink-jet printing and selective binding of catalog order forms containing tax rate information matched to the address of the catalog recipient?

Response:
We are not aware of anyone that provides the ink-jet printing service described above. Vertex has had discussions with printers that provide current ink-jet printing services. These discussions have indicated that there are not technological barriers to doing what you describe. We expect to be able to provide this service should Bellas Hess be overturned.

Question 14, Page 3.
Could the calculation module of the SalesTax Compliance System software easily be modified to link to preexisting customer software providing current inventory data on an on-line basis? Have any Vertex clients developed such a linkage, e.g. to allow personnel taking orders by phone to provide the purchaser with sales or use tax expenses? If yes, can you offer any information concerning the approximate cost, staff time, etc. needed to adapt the software in this way?

Response:
The calculation module of the SalesTax system can easily be integrated into a process to allow customers taking orders by phone to quote a tax amount. Many of our existing customers ccurrently provide this facility. The programming effort to accomplish this should take no longer than one day.

Question 15, Page 3.
Does Vertex for anyone else of whom you are aware have under development a software system that would provisionally identify non-profit and governmental (and other?) organizations as tax-exempt in their purchases based on a unique identifier like their FEIN and flag that need of a seller to obtain an exemption certificate?

Response:
Vertex does not currently have under development, nor are we aware, of any organization that provides the software that you describe.

(14)

No. 91-194

Supreme Court, U.S.
FILED
NOV 21 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

QUILL CORPORATION,

Petitioner,

v.

STATE OF NORTH DAKOTA,
BY AND THROUGH ITS TAX COMMISSIONER,
HEIDI HEITKAMP,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of North Dakota

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AMICI CURIAE BRIEF OF CARROT TOP INDUSTRIES, INC.; SARGENT SOWELL, INC.; FLORIDA GIFT FRUIT SHIPPERS ASSOCIATION; MAIL ADVERTISING SERVICE ASSOCIATION INTERNATIONAL; PARCEL SHIPPERS ASSOCIATION; AND MAILORDER ASSOCIATION OF NURSERIES IN SUPPORT OF THE PETITIONER

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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Respondent.

On Writ of Certiorari to the Supreme Court of the State of North Dakota

AMICI CURIAE BRIEF OF CARROT TOP INDUSTRIES, INC.; SARGENT SOWELL, INC.; FLORIDA GIFT FRUIT SHIPPERS ASSOCIATION; MAIL ADVERTISING SERVICE ASSOCIATION INTERNATIONAL; PARCEL SHIPPERS ASSOCIATION; AND MAILORDER ASSOCIATION OF NURSERIES IN SUPPORT OF THE PETITIONER *

STATEMENT OF INTEREST

The *amici curiae* who join in this Brief are either small mail order dealers or are trade associations of businesses engaged in some facet of the mail order industry. Virtually all of their members are small businesses. All have a vital interest in upholding *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), and with the consent of the parties respectfully submit their brief as *amici curiae* in support of the position of the Petitioner, Quill Corporation.

* Counsel for Petitioner and Respondent have consented to the filing of this *Amici Curiae* Brief. *Amici* have filed those consents with the Clerk of the Court pursuant to Sup. Ct. R. 37.2.

1. *Carrot Top Industries, Inc.* is a privately held North Carolina corporation doing business in Hillsborough, North Carolina. It sells flags, banners, and flag poles nationwide. Since most dealers in the flag industry are small retailers in urban areas, Carrot Top serves smaller, rural areas and offers a service not otherwise available. Its annual gross sales are less than $2 million and it has five regular employees, plus several seasonal employees. It files monthly sales tax returns with the State of North Carolina, the only state in which it has a physical presence. Its billing system is "home grown," and were it required to collect use tax from all or even a small part of the 6000 potential taxing jurisdictions it would be overwhelmed. In the words of its president, "I simply could not survive. I would dismantle the company and lay off all my employees."

2. *Sargent Sowell, Inc.* is a privately owned Texas corporation doing business in Grand Prairie, Texas. Since 1948, it has been in the business of direct mail sales of industrial supplies to municipalities and industries. In the words of its president it sells "everything from communion cups to prison toilets." It also manufactures and sells traffic and OSHA safety signs. It has approximately 125 employees. It files monthly sales tax returns with the State of Texas.

More than 90% of its business is to customers who are tax exempt for one reason or another. Vendors are required to obtain and keep on file tax exempt certificates for purchasers to show to state tax auditors. The simple rule of most auditors for state departments of revenue is "no certificate, no exemption, no exception." It could not as a practical matter collect and keep track of use taxes in all of the taxing jurisdictions in which it sells products by mail. There is no computer system available to secure and keep current the thousands of tax exemption certificates it would need to secure and keep on file in its records. The additional people on its payroll needed to secure and monitor these certificates would be an unnecessary, unproductive burden on the company that would undermine its profitability and jeopardize its survival.

3. *Florida Gift Fruit Shippers Association* is a Florida corporation organized in 1946 with headquarters in Orlando, Florida. It is an association of citrus fruit shippers, all located in Florida. All are small, independent family businesses engaged in marketing agricultural products which they grow. Most have a $1 million or less annual gross volume of sales and virtually all but a few are in the range of $5 million or less in annual sales volume. Of its 138 members, approximately 5 have main frame computer capabilities, approximately 40 have some type of desktop computer system, and the balance of the other 93 members have no computer capability.

If *National Bellas Hess* were overruled, two thirds of the members of the association would have to restrict their sales to Florida. The remaining one-third would face very substantial costs and difficulty in dealing with the problems of registering, collecting, filing and remitting tax to more than 6,000 taxing jurisdictions. Their customers, who literally come from all parts of the country, order gifts to be delivered to all parts of the country. Many times the state of residence of the purchaser differs from the state of residence of the person to whom it is mailed. Collection for the correct state would create a great deal of confusion.

Moreover, some taxing jurisdictions exempt seller produced agricultural products if purchased for use by the purchaser. Keeping these exemptions straight would be formidable and practically impossible. Ironically, were a reversal of *National Bellas Hess* to come about and result in drying up the interstate domestic market, the major portion of their mail order business would then have to shift to Canada, Western Europe and Japan—markets that are being expanded everyday, and which envy, study and hope to emulate the present U.S. market with its relatively free flow of goods and commerce among all 50 states.

4. *Mail Advertising Service Association International* is a not-for-profit trade association organized under the laws of the District of Columbia with headquarters in Alexandria, Virginia. Its constituent members are businesses who prepare advertising materials for nationwide distribution. Collectively they provide mailing services in all states, Canada, the United Kingdom, Western Europe and Australia. The businesses represented are diverse. Some are engaged purely in the mechanics of providing mailing services to customers who have products to sell by mail order. Others are in the creative aspect of targeting mail advertising by demographics. There are businesses of all size represented in the Association. All would suffer significant adverse affects on their business activities were *National Bellas Hess* overruled.

5. *Parcel Shippers Association* is a District of Columbia trade association located in Washington, D.C. It is composed of approximately 200 members, primarily small businesses, who use the U.S. Postal Service and private parcel delivery services to deliver small parcels to their customers. The members are also heavily reliant upon the U.S. Postal Service as their principal means of soliciting sales from customers. Their customers in turn use the postal service to place orders for merchandise and pay their bills. Most of the association's constituent members would find it impracticable if not impossible to comply with multi-jurisdictional sales and use tax registration, collection, and filing/remission requirements. Were the holding of *National Bellas Hess* to be overruled, most would have to go out of business in the face of this insurmountable obstacle.

6. *Mailorder Association of Nurseries* is the only non-profit organization representing and fostering the educational and professional needs of companies in the mail-order gardening and landscape industry. The Association was organized in the state of Michigan and presently maintains its headquarters in Laurel, Maryland. There

are over 180 member companies in the Association. The majority of member companies are actively engaged in the direct marketing of nursery stock, seeds, plants, bulbs and related products to home gardeners.

SUMMARY OF ARGUMENT

At no time since its opinion in *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), nearly twenty-five years ago, has this Court wavered in the slightest from its majority opinion. Every time this Court has examined a nexus issue that touched upon the authority of *National Bellas Hess* it has done so in a way which can only reasonably be read to have reaffirmed the continued vitality of its holding.[1]

The decision of the North Dakota Supreme Court is an aberration. It is a clear departure from the Court's holding in *National Bellas Hess*, a holding which is neither wrong nor obsolete. Reversal of the North Dakota court's decision is both appropriate and necessary to put to rest the uncertainty and confusion this decision has created in the marketplace. Refusal by certain states to accept the fact that the Constitution of the United States precludes them from requiring out-of-state mail order vendors with no physical presence within their borders to collect sales and use taxes has had a chilling effect on the willingness of new ventures to commit their resources to the mail order business. Threats such as this to the free flow of goods and commerce across state lines gave impetus to the Commerce Clause. The pall such a threat casts illustrates its continuing importance in the economic life of this nation.

If the North Dakota Supreme Court's opinion is upheld, then the very survival of the small companies rep-

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[1] *National Geographic Soc'y v. California Bd. of Equalization*, 430 U.S. 551, 559 (1977); *D.H. Holmes v. McNamara*, 486 U.S. 24, 33-34 (1988); and *Goldberg v. Sweet*, 488 U.S. 252, 109 S. Ct. 582, 589 (1989).

resented in this *amicus curiae* brief will be jeopardized. Each of the over 6,000 state and local taxing jurisdictions will have the unrestricted power to require a mail order retailer, regardless of its size, sales or resources, to collect use taxes from its customers, to register and to file regular reports to each of the jurisdictions, and to make its records and personnel available for audit in the jurisdiction. Affirmance of the North Dakota Supreme Court's opinion would mean that any state or local government could "deputize" a company to collect use taxes on behalf of the state or local government, and to file returns with the government on a monthly basis so long as that company sends three catalogs to its residents. This "threshold" would quickly be exceeded by virtually every small mail order company.

Small mail order companies have neither the resources nor the technology to administer the divergent requirements of the states and localities. The only alternative for these companies would be to discontinue their businesses, thereby protecting local firms from interstate competitors.

The *National Bellas Hess* decision has made it possible for individuals without substantial resources to sell products to a national market unencumbered by the overwhelming burden of administering tax collection for thousands of governments. Entrepreneurs have been able to expand their businesses, and add an element of competition to local, sometimes insular, markets without having to devote nonproductive resources to use tax collection. If such entrepreneurs, as a condition of start-up, had been required to collect and remit the use tax on sales throughout the United States, they likely would not have begun their businesses in the first place.

The economy needs all the jobs and business activity that entrepreneurial capital can produce. It would be strange indeed were this Court to reverse 24 years of precedent and virtually wipe out a significant segment of an entire industry. At the very least, such far ranging

policy decisions should be made by Congress, which can weigh in a political context the perils to the industry against the states' needs.[2]

A state's requirement that out-of-state dealers register and collect use taxes as a condition of conducting an interstate business via U.S. mail is a state regulatory activity which violates settled Commerce Clause jurisprudence. No state can require registration to do business when a non-resident, non-localized foreign corporation engages exclusively in interstate business.[3] Likewise, it cannot be required to register as a dealer and collect use taxes.

ARGUMENT

I. A DECISION OF THIS COURT OVERRULING *NATIONAL BELLAS HESS* WOULD PLACE IN JEOPARDY THE SURVIVAL OF SMALL MAIL ORDER COMPANIES CONDUCTING INTERSTATE SALES TRANSACTIONS.

The North Dakota law that the North Dakota Supreme Court ruled constitutional provides that any company that sends three or more mailings to North Dakota residents

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[2] It would be a most unfortunate coincidence were this Court's reversal of *National Bellas Hess* to occur in the same year the European Community is expected to complete its 15 nation, border-free trade agreement. By what logic would United States scholars and diplomats explain why we relinquished by judicial fiat the very engine of free trade and commerce among our 250 million persons market that our European allies (and competitors) have struggled for decades to create in the face of nationalistic obstacles that by comparison make this quarrel among states for tax revenues mere insignificant caviling. Where would a reversal of *National Bellas Hess* leave the administration in its efforts to create a North American Free Trade zone? Would U.S. mail order dealers have to prepare to collect and remit Canadian and Mexican use taxes for each of their states, provinces and municipal districts in three languages?

[3] *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20 (1974).

is required to administer the North Dakota sales and use tax law. N.D. Cent. Code § 57-40.2-01(6) (Supp. 1989); N.D. Admin. Code § 81-04.1-01-03.1(3). If the North Dakota Supreme Court's decision is not reversed, then every state, county, municipality, school district, transit district, and water and sewerage district throughout this country could impose use tax collection duties on mail order companies simply because they mailed catalogs into the district. As a condition of starting a business, or continuing their businesses, individuals would have to establish an elaborate mechanism and extensive work force enabling them to comply with the complex tax laws of the various jurisdictions.

A. Serving a National Customer Base Would Require the Ability to Collect Taxes in Any of Over 6,000 Different State and Local Taxing Jurisdictions, With Varying Product and Transaction Exemptions, Filing Procedures and Deadlines.

Small mail order companies could be required to deal with the individual requirements of over 6,000 different state and local taxing jurisdictions. As if different rates for each locality were not bad enough, each jurisdiction potentially has its own set of rules for exempt products, exempt purchasers and exempt transactions, to say nothing of each with its own forms, its own filing frequency and submission deadlines; and these change constantly. Even if a mail order company were able to figure all of this out, how is it going to set it out in understandable form on the back page of its catalog so that each customer can figure how much tax to include in his or her check with the order? What is the dealer to do when the amount of the remitted check is based on a miscalculation of the tax due—refund an excess, reject the order, bill for an underpayment, or just let it go?

B. The Administrative Problems of Compliance Would Be Substantial, Would Not Easily Be Solved by Computerization, and Would Be Disproportionately Expensive and Burdensome on Small Companies, With the Result that Most Small Companies Would Have to Go Out of Business.

A small mail order company would be required to shoulder an overwhelming burden if *National Bellas Hess* were overruled. A mail order company could be required to file, each month, 428 returns, for a total each year of 5,136 use tax returns.[4] This amounts to compiling, preparing and filing approximately 21 use tax returns each and every work day. This would be a formidable task even if the company had the benefit of adequate computerization, including suitable hardware and software, and personnel to operate it. A company that takes seriously its obligation to provide a statement under penalty of perjury that the disclosures on the return are accurate[5] would require several persons to corroborate the information generated by the computer and varify the accuracy of the returns. It has been reported, for example, that AT&T employs 76 persons to handle sales and use taxes, and files some 9000 returns annually.[6] While AT&T is a large company, a small mail order company would still need to hire a number of employees simply to prepare and file 5,136 returns each year.

Moreover, most small companies do not have the capital and sufficient sales volumes to purchase computers and software to prepare tax returns. In fact, one study found that a company's sales should exceed $5 million in order

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[4] *See* Appendix 3 to *Amicus Curiae* Brief of Direct Marketing Association (hereinafter referred to as DMA *Amicus* Brief).

[5] Every state imposes criminal penalties for filing false returns.

[6] "Sales Tax Nightmare on Main Street," *Forbes* at 37 (9/30/91).

to use efficiently the available use tax software.[7] Preparing 21 returns on a daily basis manually would require a large number of employees. For companies such as Carrot Top Industries, Inc. and Sargent Sowell, Inc. as well as for most of the members of the associations represented in this Brief, this would simply not be economically feasible.

Second, product exemptions and transaction exemptions vary substantially from state to state. For example, oranges sold by the producer (but not by a non-producer) are treated as exempt from sales tax by North Carolina,[8] may be exempt in Tennessee, and are taxable in Arkansas. Many states, but not all states, exempt flags, although banners, bunting and flag poles are taxable. Sales to religious and charitable organizations are exempt in some jurisdictions and not exempt in others; and while sales to municipalities are usually exempt, they are not exempt if the product is used by a contractor for a municipality.[9]

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[7] *See* Advisory Commission on Intergovernmental Relations, *State and Local Taxation of Out-of-State Mail Order Sales*, 6-7, 15 (April 1986) (hereinafter referred to as 1986 ACIR Report).

[8] An exemption granted by administrative grace. For a typical exemption provision for "agricultural products" *see* Tenn. Code Ann. § 67-6-301 (1989) which exempts from the sales tax the gross proceeds from the sale of livestock, nursery stock, poultry and other farm and nursery products directly from a farmer or nurseryman if 50% or more of such products are grown or produced by the farmer or nurseryman.

[9] These "activity" exemptions are peculiarly localized and politicized, and vary from the VFW to ethnic civic leagues, all with no rhyme or reason other than who had what political clout at one time. *See Jimmy Swaggart Ministries v. California Bd. of Equalization*, —— U.S. ——, 110 S. Ct. 688 (1990) upholding California's tax on sales by religious organizations. In contrast, *see* Tenn. Code Ann. § 67-6-322 (1989) exempting sales to 18 "religious, educational and charitable institutions" including those promoting "statewide talent and beauty pageants." *See also* Tenn. Code Ann. § 67-6-209(b) (Supp. 1990), the "Contractors Use Tax" provision.

Computers cannot be used to determine what are exempt products and exempt transactions.[10]

Third, small mail order companies would be subject to audit by each of the 432 jurisdictions that administer sales and use taxes throughout the country. Mail order marketers could find themselves embroiled in a never-ending series of audits tying up valuable time and resources of people critical to the successful day-to-day operation of their business.

Fourth, the problems in collection of use tax from consumers who do not remit the tax with their orders are significant. Since the amount of use tax due on an order is typically substantially under $10.00, the costs of post-sale collection can exceed the amount to be recovered from the customer. In most cases, the company may have no practical choice but simply to pay the tax out of what little profits remain on the transaction and forego collection from the customer.

In short, the Court's description in *National Bellas Hess* of the administrative burden continues today for small mail order companies. As the Court stated:

> And if the power of Illinois to impose use tax burdens upon National were upheld, the resulting impediments upon the free conduct of its interstate business would be neither imaginary nor remote. . . . The many variations in rates of tax, in allowable exemptions, and in administrative and record-keeping requirements could entangle National's interstate business in a virtual welter of complicated obligations to local jurisdictions with no legitimate claim to impose "a fair share of the cost of the local government."

386 U.S. at 759-60 (footnotes omitted).

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[10] *See* Appendix 4, DMA *Amicus* Brief. Nor can computers obtain, screen for completeness, and keep on file thousands of exemption certificates.

Today there are over 6,000 jurisdictions that impose sales and use taxes;[11] whereas there were only 2,300 when the Court decided *National Bellas Hess*. 386 U.S. at 759 n. 12. Furthermore, there are now 90 separate rates of tax[12] as compared with 8 when *National Bellas Hess* was decided. *Id.* at 759 n. 13. In 1967 National Bellas Hess was a very large company which had annual sales of $60 million. Certainly, if anything, it would be more difficult today for a small mail order company to collect sales and use taxes throughout the country than would have been the case for National Bellas Hess in 1967.

It is doubtful that computer programs that will automatically track the myriad of sales and use tax rates rules, and exemptions nationwide are feasible. If they did exist, the cost would be prohibitive to smaller dealers. Compliance would require a large fixed cost for people and equipment which results in a very high relative cost of collection being imposed on small mail order dealers.[13] Most simply will not be able to afford the expense and handle the administrative burden of use tax collection nationwide.

In short, many small companies faced with these compliance problems will have no real choice but to stop their mail order business. They simply cannot survive. The consequence will be a lessening of competition for local merchants. This suggests that the result of the increased costs of doing business is both discriminatory against interstate merchants[14] and protectionist of local mer-

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[11] *See* Appendix 1 to DMA *Amicus* Brief.

[12] *See* Appendix 2 to DMA *Amicus* Brief.

[13] *See* 1986 ACIR Report at 48.

[14] The cost of compliance with the North Dakota use-tax collection requirement is six to seven times greater for mail order marketers than it is for retailers that collect sales tax at the cash register. *Brief of Petitioner*. North Dakota's rate of reimbursement for these compliance costs is the same for in-state and out-of-state sellers alike. *See* N.D. Cent. Code § 57-40.2-07.1(1). That cost approximates the actual costs to the average local retailer. Thus, interstate marketers are disadvantaged. It is true that they are similarly disadvantaged if they have physical presence in the taxing jurisdiction, but interstate firms have control over their decision to localize. The North Dakota rule gives small marketers only two choices: serve the state and collect use taxes or exit the market. The Commerce Clause assures access to each state market, and the choice put to small marketers is one that the Commerce Clause bars.

chants.[15] Safeguarding against discrimination is the very core value protected by and enforced under the Commerce Clause. *See Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318 (1977).

II. SMALL MAIL ORDER COMPANIES DO NOT RECEIVE ANY BENEFITS FROM STATES TO WHICH THEY SEND THEIR CATALOGS AND SHIP THEIR PRODUCTS.

The North Dakota Supreme Court concluded that "the direct marketing of the 1990's bears little resemblance to the mail order of the 1960's." *North Dakota v. Quill Corp.*, 470 N.W.2d 203, 209 (N.D. 1991). The Court felt that mail order customers' use of "toll-free incoming telephone lines, national WATS telephone service, fax machines, telex, or direct computer communication" somehow provides benefits to out-of-state companies. *Id.*

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[15] North Dakota's tax-collection scheme, while facially neutral, discriminates in practice. Such discrimination is unconstitutional under the Commerce Clause. *See, e.g., Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977). *Cf. Nippert v. City of Richmond*, 327 U.S. 416 (1946) (cumulative costs of interstate merchants, which increase costs of interstate sellers relative to intrastate merchants, are discriminatory in violation of the Commerce Clause); *American Trucking Ass'n v. Scheiner*, 483 U.S. 266 (1987) (flat taxes on trucks discriminate against interstate trucks that use state's highway proportionately less than intrastate trucks).

The small mail order companies disagree with this conclusion. The fact remains that each of these cited means of communication involved interstate common carriers, which the Court in *National Bellas Hess* clearly found to not constitute a benefit received by an out-of-state company. 386 U.S. at 758.

More importantly, however, most small mail order companies do not use any of the so-called modern communication devices referred to in the *Quill* case. Carrot Top Industries and most of the Florida fruit shippers receive orders solely by mail and by telephone, without the use of toll-free incoming telephone lines or national WATS telephone service.

III. IF ANY CHANGE IS NECESSARY TO THE *NATIONAL BELLAS HESS* STANDARD, IT SHOULD BE MADE BY CONGRESS, AND NOT BY THE COURTS.

As this Court observed in the majority opinion in *National Bellas Hess*, any change in the rule of nexus for mail order dealers is appropriately addressed to the Congress of the United States. Many hearings have been conducted and many proposals have been set forth in Congress attempting to balance the interest of states in collecting their tax revenues and the interest of private concerns in being able to engage in interstate commerce without undue restriction and regulation. Each of the bills would have provided for a *de minimis* exemption such that small companies such as the instant *amici* would have been exempt from sales tax.[16] *De minimis*

[16] All recent Congressional bills introduced to overrule *National Bellas Hess* incorporated a *de minimis* exception. For example, H.R. 5021, 99th Cong. 2d Sess., 132 Cong. Rec. H3656 (1986), H.R. 1891, 100th Cong. 1st Sess., 133 Cong. Rec. H1764 (1987), H.R. 3521, 100th Cong. 1st Sess., 133 Cong. Rec. H8916 (1987), and S. 1099 100th Cong. 1st Sess., 133 Cong. Rec. S5603 (1987) provided an exemption for those companies that had gross receipts in the United States of not more than $12.5 million or in each state

exemptions were proposed because of the clear recognition that small mail order companies would not be able to stay in business and collect use taxes in 45 states (and the District of Columbia).[17] These bills have not been adopted, blocked for the most part by the inability of states and their local governments to agree on such issues as uniform rates. Resort by the States to the passage and attempted enforcement of nexus statutes which are in clear conflict with well settled constitutional principles and after Congress has refused to adopt legislation overruling *National Bellas Hess* is a tactic that should be soundly rebuffed by this Court.

Confrontation with a settled constitutional doctrine rather than reaching a reasonable political accommodation in the Congress should not be rewarded,[18] and most

of not more than $500,000 in any calendar year. H.R. 1242, 100th Cong., 1st Sess., 133 Cong. Rec. H835 (1987) provided a $5 million threshold for annual sales.

[17] The Congressional agency ACIR recommended in its 1986 report a *de minimis* exemption from sales and use tax collection for companies with national sales of less than $12.5 million, stating as follows:

> To reduce the compliance cost burden on small businesses, the legislation would contain a de minimis rule, exempting vendors with national sales and/or sales in the destination state below a specified dollar amount. The de minimis figures should be no less than $12.5 million in gross sales, indexed annually to the Consumer Price Index to account for inflation.

1986 ACIR Study at 5. It is noteworthy that, even though ACIR also proposed 46 national rates administered by the states rather than the 6,000 rates to ease compliance costs, it strongly recommended exemption for small mail order companies because of the compliance costs in collecting taxes in only 46 jurisdictions. 1986 ACIR Study at 15. If the North Dakota Supreme Court's decision is upheld, mail order companies will not only have to collect sales and use taxes, but could have to collect them for over 6,000 jurisdictions.

[18] The ability of states to influence Congress has been recognized by this Court. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

certainly the interests of small entrepreneurs and businesses should not be sacrificed in the process.

IV. NORTH DAKOTA'S REQUIREMENT THAT OUT-OF-STATE MAIL ORDER DEALERS REGISTER, COLLECT AND REMIT TO IT USE TAXES AS A CONDITION OF CONDUCTING BUSINESS IN NORTH DAKOTA THROUGH THE U.S. MAIL AND VIA COMMON CARRIER IS A STATE REGULATORY ACTIVITY WHICH VIOLATES SETTLED COMMERCE CLAUSE JURISPRUDENCE.

In its opinion the North Dakota Supreme Court understandably focused its attention on *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 754 (1967), and its ongoing vitality.[19] The North Dakota Supreme Court placed great emphasis on the changing legal landscape in the area of state taxation wrought by this Court's decision in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), and concluded that "the foundational basis of *Bellas Hess* has been eroded." 470 N.W.2d at 209. *Amici* believe that the North Dakota Supreme Court erred in this conclusion. The doctrinal foundation of *National Bellas Hess* was entirely left intact by *Complete Auto*, which recognized that no state could tax interstate commerce unless the activities of interstate commerce that a state sought to tax had a substantial nexus with the taxing jurisdiction. In addition, by exclusively relying on

[19] In refusing to comply with the holding of *National Bellas Hess*, the North Dakota Supreme Court violated the admonition of this Court that the overruling of directly applicable Supreme Court precedents is a prerogative of this Court. Lower courts are duty-bound to apply a directly applicable precedent unless that precedent has been explicitly or implicitly overruled: "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989).

the framework developed for state taxation cases in *Complete Auto*, the North Dakota Supreme Court failed to recognize the reinforcing effect of this Court's settled jurisprudence when state regulatory activity is reviewed under the Commerce Clause, and the fact that Quill's grievance is with the regulatory reach of North Dakota's law. Quill does not contest North Dakota's power to assess a use tax on its sales to North Dakota residents, but instead contends that it should not be required to register and collect use taxes for North Dakota.

A. Regulatory Cases Under the Commerce Clause: An Analytical Overview.

This Court has "adopted . . . a two-tiered approach to analyzing state economic regulation under the Commerce Clause." *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 467 U.S. 573, 578-79 (1986). When a regulatory measure "has only indirect effects on interstate commerce and regulates evenhandedly," the Court has applied a balancing analysis. The question is "whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits." *Id.* at 579, citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).[20] On the other hand,

[20] This balancing approach, which traces back at least as far as this Court's decision in *Southern Pac. Co. v. Arizona*, 325 U.S. 761, (1945), has been controversial and subject to criticism from the outset. *See id.* at 789 (Black, J., dissenting). Critics argue that such a balancing process is "ill-suited to the judicial function." *See CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 95 (1987) (Scalia, J., concurring in part and concurring in judgment). They assert that the balancing approach requires weighing interests that are "incommensurate," a process that is "squarely within the responsibility of Congress." *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring in judgment). Dispite criticism of this aspect of Commerce Clause doctrine, Justice Scalia has stated that "[i]ssues already decided [*e.g., National Bellas Hess*] I would leave untouched." *Id.*

"[w]hen a state statute directly regulates . . . interstate commerce," this Court has "generally struck down the statute without further inquiry." *Brown-Forman Distillers Corp.*, 476 U.S. at 579.[21] That is, when a state "directly regulates" interstate commerce, the state regulatory law constitutes a violation of the Commerce Clause without the necessity of engaging in a balancing analysis.[22] *See Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336-37 & n. 14 (1989); *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 88-89, 94-95 (1987) (Scalia, J., concurring in part and concurring in the judgment); *Edgar v. MITE Corp.*, 457 U.S. 624, 642-43 (1982) (plurality opinion of White, J.);[23] *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20 (1974).

In *Brown-Forman Distillers Corp.* this Court cited as authority *Shafer v. Farmers Grain Co.*, 268 U.S. 189 (1925). *Shafer* held that a pervasive state regulatory scheme governing the purchase of wheat for interstate shipment violated the Commerce Clause, since the "[b]uying for shipment" was "as much a part of [interstate

[21] *Brown-Forman Distillers Corp.*, identified three situations in which a regulatory statute will be held unconstitutional under the Commerce Clause without balancing national against local interests: (1) Direct regulation of interstate commerce; (2) Discrimination against interstate commerce; (3) When the "effect is to favor in-state economic interests over out-of-state interests." 476 U.S. at 579.

[22] There is apparent consensus about the proper approach to cases involving direct regulation of interstate commerce. For example, Justice Scalia apparently accepts the brightline rule that direct regulation of interstate commerce violates the Commerce Clause. *See CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 94 (1987) (Scalia, J., concurring in part and concurring in judgment) (joining Part III-B of the majority opinion).

[23] The analytical approach of the plurality opinion of Justice White was subsequently adopted by a majority of the Court. *See Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 578-79 (1986); *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 88-89 (1987); *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336-37 (1989).

commerce] as the shipping." 268 U.S. at 198. *Shafer*, indeed is but one of a long line of cases holding that states cannot directly regulate interstate commerce. *See, e.g., International Textbook Co. v. Pigg*, 217 U.S. 91 (1910) (State cannot require non-resident, non-localized foreign corporation transacting solely interstate business to register with the state). As this Court explained in *Shafer*, the right to conduct interstate commerce "is not a privilege derived from state laws and which they may fetter with conditions, but is a common right, the regulation of which is committed to Congress and denied to the States by the commerce clause of the Constitution." 268 U.S. at 198-99 (footnote omitted).

Shafer followed the line of reasoning in *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921). In *Dahnke-Walker* a Tennessee corporation contracted with a Kentucky farmer for the purchase of wheat through a locally resident agent. The wheat was to be used at the buyer's mill in Tennessee. Since the Tennessee corporation had made other purchases of wheat in Kentucky, the transaction was not a single isolated deal but part of a course of trade. This Court held that the transaction was in interstate commerce and that, therefore, Kentucky could not regulate it. The Tennessee corporation could not be required to register in Kentucky. *See also Lemke v. Farmers Grain Co.*, 258 U.S. 50 (1922).

The ongoing vitality of the *Shafer* and *Dahnke-Walker* line of cases was reaffirmed in *Allenberg Cotton Co. v. Pittman*, 419 U.S. 19 (1974). In *Allenberg*, a Memphis, Tennessee, cotton merchant negotiated a contract with a Mississippi farmer for the delivery of cotton to be resold on the interstate and international markets. This transaction was part of a common course of dealing and was not an isolated incident. This Court held that the transaction was in interstate commerce, and, therefore, Mississippi could not constitutionally require the Tennessee cotton merchant to register in Mississippi. A direct regu-

lation of an exclusively interstate transaction violated the Commerce Clause.

Shafer, *Dahnke-Walker*, and *Allenberg* continue to be good law and have been cited in very recent decisions of this Court. As previously noted, this Court cited *Shafer* for the proposition that a state statute that directly regulates interstate commerce violates the Commerce Clause without a balancing analysis. *See Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986). And both *Dahnke-Walker* and *Allenberg* were reaffirmed and relied on by Justice Kennedy's majority opinion in *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 893 (1988).

B. North Dakota's Use-Tax Collection Requirement Has Regulatory Characteristics.

The challenged North Dakota statute is essentially regulatory in nature. States that impose a duty on retailers to collect use taxes are conscripting those sellers into service on behalf of the state. Quill does not challenge the authority of North Dakota to levy the use tax on its own citizens; it contests the burdensome character of the regulatory mechanism by which North Dakota seeks to enforce the tax.

Under North Dakota law, which is typical in this regard, "the consumer is ultimately responsible for the tax." *North Dakota v. Quill Corp.*, 470 N.W.2d at 205. The retailer must register with the state but is merely "required to collect the tax from the consumer and remit it to the State." *Id.* Under the typical scheme, if the retailer fails to collect the appropriate tax, it becomes liable for the deficiency to the state out of its own funds. *See National Geographic Soc'y v. California Bd. of Equalization*, 430 U.S. 551, 558 (1977). Thus, under a sales/use tax regime, the retailer serves as a state-conscripted conduit for the collection of state taxes from consumer-purchasers. The tax liability of the retailer is only contingent upon the retailer's failure properly to assess and collect the tax owing from the consumer. This liability in reality is in the nature of a fine or a penalty for the retailer's inability or refusal to assess or collect the tax from the consumer.

Operationally, the North Dakota sales/use tax collection framework requires retailers (including catalog sellers such as Quill) to register with the state. This is a regulatory mechanism that is akin to the requirement under traditional state corporate law that corporations doing business in the state must register ("qualify to do business") with the state. Appropriate and complete analysis of the impact of the North Dakota statute on the conduct of interstate business activity requires analysis of the *National Bellas Hess* doctrine in the context of controlling precedent imposing limitations on the power of states to require non-resident corporations to qualify to do business in a state when doing exclusively interstate business. *See Allenberg Cotton Co. v. Pittman*, 419 U.S. 20 (1974).

A major concern of the Court in *National Bellas Hess* was the need for national uniformity, the absence of which would impose "impediments upon the free conduct of . . . interstate business." 386 U.S. at 759. The Court in *National Bellas Hess* worried about the burdens on interstate commerce that would arise from "[t]he many variations in rates of tax, in allowable exemptions, and in administrative and record-keeping requirements." *Id.* These "could entangle . . . interstate business in a virtual welter of complicated obligations to local jurisdictions. . . ." Such a regime would be inconsistent with the "very purpose of the Commerce Clause," which was to "ensure a national economy free from such unjustifiable local entanglements." *Id.* at 759-60.

It is clear that in *National Bellas Hess* the Court was not so much focusing on the fairness of the taxation methodology as on the burdens on commerce stemming

from the regulatory character of the challenged statute. Burden-on-interstate-commerce concerns are incorporated in this Court's traditional Commerce Clause jurisprudence regarding state regulatory statutes. In the regulatory sphere, direct regulation of interstate commerce (as in the present case) is unconstitutional under the Commerce Clause.

Quill's grievance, as was the case in *National Bellas Hess*, is with the regulatory reach and character of the North Dakota use-tax-collection law. There is no challenge to the fairness of North Dakota's imposing a use tax on its own citizens. The challenge is to the burdensomeness of the state's use-tax-collection regulation on the system of interstate commerce. For example, in *National Bellas Hess*, the Court concluded that only Congress had the "power of regulation and control" over exclusively interstate commerce where there was no localization. 386 U.S. at 759-60. *National Bellas Hess* has not been undermined by *Complete Auto*; rather, *National Bellas Hess* remains fully vibrant, consistent not only with *Complete Auto* but also with *Allenberg* and similar cases holding that direct regulation of interstate commerce violates the Commerce Clause.

C. The Commerce Clause/Regulation Cases Reinforce the Nexus Analysis of *Complete Auto* and Require Reversal of the Decision of the North Dakota Supreme Court.

The Commerce Clause bars direct regulation of interstate commerce by states. This broad principle has been enforced in the *Allenberg* line of cases by a bright-line rule that state regulatory authority cannot be exercised over non-resident, non-localized firms doing exclusively interstate commerce. This principle is parallel to and reinforces the physical presence requirement set forth in *National Bellas Hess*.

In *Allenberg* it was argued that the Tennessee cotton merchant had been doing business in Mississippi and therefore had localized its operations sufficiently to allow Mississippi to enforce a registration requirement. This Court took that issue seriously, going to great lengths to distinguish *Eli Lilly & Co. v. Sav-On-Drugs, Inc.*, 366 U.S. 276 (1961), and *Union Brokerage Co. v. Jensen*, 322 U.S. 202 (1944). In *Allenberg* this Court found *Eli Lilly* "not in point" because "the foreign corporation had an office and salesmen [in-state] selling drugs intrastate. Since it was engaged in an intrastate business it could be required to obtain a license even though it also did an interstate business." 419 U.S. at 32. Similarly, *Union Brokerage* was not determinative because the custom house broker involved therein had localized its business and thus had a distinct presence within the state, even though it did an interstate trade. Thus, the broker could be required to register by the state in which it had a presence. *Id.* at 32-33.

In the *Allenberg* line of cases this Court has had to deal with the precise issue raised in this litigation, and this Court has consistently drawn the same line in those cases as it did in *National Bellas Hess*. The counterparts to *Eli Lilly* and *Union Brokerage* (distinguished in *Allenberg*) in the *National Bellas Hess* line of cases are such decisions as *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960), and *National Geographic Soc'y v. California Bd. of Equalization*, 430 U.S. 551 (1977). In *Scripto*, Florida was allowed to impose a duty of collecting use tax on a Georgia seller because the seller had "10 wholesalers, jobbers, or 'salesmen' conducting continuous local solicitation in Florida and forwarding the resulting orders to Atlanta for shipment of the ordered goods." 362 U.S. at 211. This Court in *National Bellas Hess* explicitly distinguished *Scripto* on the ground of lack of localization, 386 U.S. at 757-58, the same ground the *Allenberg* Court relied on to distinguish *Eli Lilly*. Similarly, in *National Geographic*, this Court permitted California to require the seller to collect use tax because the seller had two ad-

vertising sales offices in California. The Court in *National Geographic* noted that *National Bellas Hess* drew a "sharp distinction . . . between mail order sellers with retail outlets, solicitors, or property within [the taxing] State, and those [like National Bellas Hess] who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business." 430 U.S. at 559, quoting *National Bellas Hess*, 386 U.S. at 758. The *National Bellas Hess* Court found the "sharp distinction" it drew to be generally recognized and valid and declined to "obliterate it." *Id.* The Court in *National Geographic* accepted the distinction and merely applied it to a different set of facts—a situation where localization had occurred. 430 U.S. at 559.

Under the *Allenberg* line of cases, no state can require registration when a non-resident, non-localized foreign corporation engages exclusively in interstate commerce. In *Allenberg* this Court painstakingly demonstrated the lack of localization of the Tennessee cotton merchant in Mississippi:

> Appellant . . . has no office in Mississippi, nor does it own or operate a warehouse there. It has no employees soliciting business in Mississippi or otherwise operating there on a regular basis; its contracts are arranged through an independent broker, who has no authority to enter into contracts on behalf of appellant. . . . . In short, appellant's contracts with Mississippi do not exhibit the sort of localization or intrastate character which we have required in situations where a State seeks to require a foreign corporation to qualify to do business.

419 U.S. at 33.[24]

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[24] The Court in *Allenberg* left open the question whether the cotton grown and stored in Mississippi, because of its physical presence in Mississippi, provided local tax incidents that could be reached. The validity of such a tax would be analyzed under the *Complete Auto* framework.

This analytical approach tracks very closely with the approach adopted in *National Bellas Hess* and subsequent cases. It is therefore quite clear that, under *Allenberg*, Quill could not be required by North Dakota to qualify to do business, just as, under *National Bellas Hess*, it cannot be required to register and collect North Dakota use taxes.

These parallel and reinforcing lines of cases demonstrate the compelling rationale for the ongoing vitality of *National Bellas Hess*. Under the current doctrinal regime, a seller is only required to register and undertake use-tax-collection obligations for a state when it would otherwise be required to register to do business in a state. When states cannot require non-resident, non-localized foreign corporations doing exclusively interstate business to register to do business, they cannot require those same companies to register as agents of the state for purposes of collecting the state's use tax. The nature of the state's regulatory burden on companies is similar in the two situations, and it makes good sense to retain the linkage that exists under current doctrine. If a company must qualify to do business within a state—a decision it can control—the company is on notice that it must also register to collect and remit use taxes for that state.

The bright-line rule that characterizes the *Allenberg* and the *National Bellas Hess* approaches is easily administrable, keeps the regulatory burden on doing business under control, and does not put the courts in the business of incessantly intervening in the process of fine-tuning the rules regarding the scope of state regulatory power.[25] The *Allenberg* and *National Bellas Hess* formulations have had the virtue of minimizing litigation and allowing participants in the marketplace to guide their business judgments by clearly defined and easily understood rules.

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[25] The merit of a bright-line rule "lies in the clarity of its command and the certainty of its application," even if there are some costs that may be associated with its use. *See Minnick v. Mississippi*, —— U.S. ——, 111 S. Ct. 486 (1990).

This is a virtue that will be lost by a shift to an amorphous, litigation-generating formulation as suggested by the North Dakota Supreme Court.

This Court's analysis in the very recent *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888 (1988), provides further support for the application of the *Allenberg* line of cases to reverse the decision of the North Dakota Supreme Court. In *Bendix Autolite*, an Illinois corporation sold and installed a boiler in Ohio. A dispute arose, and suit was brought against the Illinois corporation. Ohio's statute of limitations was tolled because the Illinois corporation was not present in Ohio and had not designated an agent for service of process. This Court held the Ohio tolling law violative of the Commerce Clause.

Ohio forced a company to choose between the burden of designating an agent for service of process (thereby subjecting it to general jurisdiction in Ohio) and forfeiture of a statute of limitations defense. This Court found that choice to be a significant Commerce Clause burden and held that Ohio could not withdraw the limitations defense "on conditions repugnant to the Commerce Clause." *Id.* at 893. Under *Allenberg* and *Dahnke-Walker*, the Illinois corporation could not be required to designate an agent for service of process; conditioning a limitations defense on the "waiver or relinquishment" of those rights violated the Commerce Clause.

Bendix Autolite has a direct bearing on the issues in this matter. Under *Allenberg* and *Dahnke-Walker*, North Dakota has no right to assert regulatory authority over a non-resident, non-localized company like Quill that engages exclusively in interstate commerce. Thus, North Dakota cannot require Quill to register in North Dakota. But Quill fails to register at its peril. Under North Dakota's typical use tax regime, Quill's failure to register makes it liable from its own funds for use taxes North Dakota says are owing from Quill's customers.

Thus, Quill faces a very costly choice, much like the choice deemed unconstitutional in *Bendix Autolite*. In *Bendix Autolite*, Ohio cut off a limitations defense so long as the Illinois corporation exercised its constitutional right not to register. Here, North Dakota imposes tax liability on Quill for exercising its *Allenberg* rights not to register. Surely, North Dakota cannot impose this barrier to access to its marketplace. *Allenberg* and numerous other Commerce Clause cases protect the right of non-resident, non-localized foreign corporations to transact interstate business. Yet, North Dakota conditions this access in an extremely onerous manner. If Quill is to sell in North Dakota, it must either relinquish its *Allenberg* rights not to register or subject itself to potential liability for uncollected use taxes.[26] This is precisely the type of burden on the national economic marketplace that *Bendix Autolite* held to violate the Commerce Clause.

A shortcoming, then, of the North Dakota Supreme Court's analysis of this matter is not only its failure to adhere to the still-valid nexus approach of *National Bellas Hess* and *Complete Auto*, but also its failure to examine the entire commercial context in which the issue arises. The North Dakota Supreme Court ignored the critical significance of the *Allenberg/Dahnke-Walker* line of Commerce Clause regulation cases despite the fundamental symmetry between the approaches in *Allenberg* and *National Bellas Hess*. There is no dispute about the constitutional ability of North Dakota to levy a tax on the use of goods bought by its residents from Quill. What is at issue is the regulatory technique of collection embraced by North Dakota to enforce its power of taxation.

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[26] As in *Bendix Autolite*, Quill would likely be subject to personal jurisdiction in North Dakota and therefore subject to suit in North Dakota for collection of taxes. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). That the personal jurisdiction issue differs from the Commerce Clause issue is clear from the statement in *Allenberg* that "[w]hether the course of dealing would subject [Allenberg] to suits in Mississippi is . . . a different question on which we express no view." 419 U.S. at 34.

North Dakota is seeking directly to regulate exclusively interstate transactions and to thrust its regulatory power extraterritorially; this it cannot do under the Commerce Clause.

CONCLUSION

Amici curiae respectfully submit that this Court should reverse the North Dakota Supreme Court in *Quill* and reaffirm the principles set forth in *National Bellas Hess* and the other cases of like result.

Respectfully submitted,

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(5)

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IN THE

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v.

STATE OF NORTH DAKOTA,
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HEIDI HEITKAMP,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of North Dakota

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BRIEF FOR THE STATES OF NEW HAMPSHIRE, DELAWARE AND MAINE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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BRIEF FOR THE STATES OF NEW HAMPSHIRE, DELAWARE AND MAINE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTERESTS OF *AMICI CURIAE*

The States of New Hampshire, Delaware, and Maine file this brief as *amici curiae* in support of Petitioner Quill Corporation. The States urge reversal of the decision below, which rejects *National Bellas Hess, Inc.* v. *Department of Revenue*, 386 U.S. 753 (1967), as "obsolescent precedent," and holds, in defiance of *Bellas Hess*, that consistent with the Commerce Clause a State can require an out-of-state business to act as that State's use-tax collection agent when it has no physical presence in that State.

Amici have an interest in protecting their State economies from the parochial tax revenue policies of North Dakota and other tax-aggressive States. *Amici* urge this Court to adhere to its historical practice under the Commerce Clause of entrusting to Congress complex questions of national economic policy such as those that would be involved in a decision to replace the bright-line "physical presence" test of *Bellas Hess* with an amorphous "economic presence" rule.

Amici believe that the short-term revenue gains some individual State and local tax authorities might reap from overturning *Bellas Hess* would be far outweighed by the long-term adverse consequences for the economies of the Nation and of the *amici* States. Such a decision, because of the cumulative burdens it would place upon vendors who do business by mail, would, among other things, restrict the ability of consumers to obtain ready access to products that are available only by mail or in large cities, lead to a rise in consumer prices, threaten the viability of small and emerging enterprises that continue to be one of the few sectors of the economy to create new jobs, and encourage just the sort of balkanization of trade among the States that the Commerce Clause was intended to prevent.

SUMMARY OF ARGUMENT

I. This Court has long held unconstitutional any State requirement that a mail-order business with no physical presence in the State collect use taxes on sales to residents of that State. *National Bellas Hess, Inc.* v. *Department of Revenue*, 386 U.S. 753 (1967). There is no basis for the opinion of the North Dakota Supreme Court below that the bright-line rule of *Bellas Hess* is "obsolescent" or for overruling *Bellas Hess*. Anything less than a reaffirmance of the "physical presence" test would encourage costly and widespread litigation.

North Dakota's argument here appears to be driven by a parochial desire to maximize that State's revenue at the

expense of national economic values that are the foundation of the Commerce Clause. If that argument is accepted, interstate mail-order businesses—most of them small and moderate-sized enterprises—could be required to calculate and remit taxes to as many as 6,500 governmental entities with as many as 90 different sales and use tax rates and widely varying definitions of taxable items. While computer technology has advanced since 1967, the number and complexity of such taxes have also increased dramatically, and there is no evidence that the practical considerations underlying *Bellas Hess* have disappeared.

II. Whether the bright-line rule of *Bellas Hess* should be changed, and if so to what extent and in what manner, is a question that is properly reserved for the exercise of Congress's power to regulate interstate commerce. Congress continues to consider the question, and is uniquely positioned to fashion any alternative to the "physical presence" test and to tailor any change in the law to the exigencies of smaller businesses.

III. A. Even if the Court were to examine anew the Commerce Clause question raised by the North Dakota statute, the Court should reach the same conclusion it reached in 1967 in *Bellas Hess*. This Court has consistently recognized that allowing one State or local jurisdiction to require use tax collections by out-of-state vendors who receive no substantial State services would invite the thousands of other taxing authorities to do likewise, and that the resulting cumulative burdens upon interstate commerce must be considered under the Commerce Clause.

B. The cumulative burdens upon companies that sell by mail are as significant today as they were when *Bellas Hess* was decided. North Dakota's proposal to substitute an amorphous "economic presence" rule for this bright-line test would require out-of-state mail-order sellers to master and to keep abreast of the volumes of ever-changing rates, exemptions, and classifications set forth in State and local use-tax schemes; to supplement and

continuously update advertisements and catalogs in order to inform consumers of the details of possibly applicable taxes; to cooperate with costly and time-consuming tax audits; to incur substantial added expenses in the recordation of sales and inventory; and either to prepare to litigate the fact-specific question of "economic presence" in gray-area cases throughout the country, or to overcollect and overpay use taxes in order to avoid the time and expense of such litigation. The cumulative effects of such regulation would be to suppress interstate commerce in ways that inevitably would lead to higher prices and to depriving consumers, especially those in relatively isolated areas, of ready access to a full range of products.

C. Effective alternative means—such as Maine's use-tax statute—already exist by which individual States that wish to collect use taxes on their residents' out-of-state purchases can do so without unjustifiably burdening out-of-state vendors.

IV. If the Court were to overrule *Bellas Hess*—as it should not—the Court should state expressly that such a decision would apply only prospectively. Retroactive application of a new "economic presence" rule would result in staggering financial liability for interstate businesses that reasonably relied on *Bellas Hess*. Silence on this subject could, under *James B. Beam Distilling Co.* v. *Georgia*, 111 S. Ct. 2439 (1991), lead to the imposition of just such retroactive liability; at a minimum, it would lead to prolonged uncertainty and widespread, costly litigation.

ARGUMENT

I. OVERRULING *BELLAS HESS* WOULD SACRIFICE THE CERTAINTY OF THE BRIGHT-LINE RULE UPON WHICH A SUBSTANTIAL ELEMENT OF THE NATIONAL ECONOMY IS FOUNDED, MERELY TO SERVE THE SHORT-TERM PAROCHIAL REVENUE INTERESTS OF SOME STATES

In more than a half century of decisions weighing the constitutionality of State laws requiring out-of-state vendors to collect State use taxes, this Court has enforced a "sharp distinction" between out-of-state mail-order sellers who maintain "retail outlets, solicitors, or property within a State," and "those who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business." *National Bellas Hess, Inc.* v. *Department of Revenue*, 386 U.S. 753, 758 (1967).[1] These decisions allow a State to compel only those vendors who maintain a physical presence in the State, and thereby substantially benefit from State services, to collect and remit use taxes for the State's benefit. *See id.* at 756-60.[2]

In *Bellas Hess*, the State of Illinois requested this Court "to obliterate" this basic distinction. *Id.* at 758. The State urged the Court to adopt instead an amorphous "economic presence" rule, under which Illinois could have required out-of-state vendors maintaining no physical presence in Illinois to serve as State tax collectors. *See id.*; *Bellas Hess* Brief for Appellee at 33-34. The Court

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[1] *See also National Geographic Soc'y* v. *California Board of Equalization*, 430 U.S. 551 (1977); *Miller Bros. Co.* v. *Maryland*, 347 U.S. 340 (1954); *Nelson* v. *Montgomery Ward & Co.*, 312 U.S. 373 (1941); *Nelson* v. *Sears, Roebuck & Co.*, 312 U.S. 359 (1941).

[2] For purposes of convenience, we follow the practice of the court below (and commentators) of referring to the "sharp distinction" in *Bellas Hess* as the "physical presence" test. *See, e.g., State by Heitkamp* v. *Quill Corp.*, 470 N.W.2d 203, 207, 211-12 (N.D. 1991).

refused to do so. The Court found it difficult to conceive of commercial transactions more exclusively interstate in character than mail-order transactions, and observed that such purely out-of-state mail-order businesses do not receive the same substantial State services that in-state businesses receive. The Court further noted the intolerable burdens that would be visited upon out-of-state mail-order sellers if other States and the then-existing 2,300 local taxing authorities were allowed to impose similar tax-collection obligations upon them, entangling them "in a virtual welter of complicated obligations to local jurisdictions." 386 U.S. at 758-60 & n. 12. In so holding, the Court reaffirmed that

> [t]he very purpose of the Commerce Clause was to ensure a national economy free from such unjustifiable local entanglements. Under the Constitution, this is a domain where Congress alone has the power of regulation and control.

Id. at 760.

Today, North Dakota requests this Court to approve a statute that in all material respects is identical to the one this Court struck down in *Bellas Hess*. The North Dakota Supreme Court would have this Court reject *Bellas Hess* as obsolescent. *State by Heitkamp* v. *Quill Corp.*, 470 N.W.2d 203, 208 (N.D. 1991). Although the court below also contends—erroneously, as we shall show in Part III of this brief—that the legal principles underlying *Bellas Hess* have changed, that is plainly not the driving force behind North Dakota's position. Rather, the reason North Dakota seeks to reinterpret the Constitution, as well as the foundation for its argument here, is that the volume of mail-order sales has grown greatly in recent years. It is this which the North Dakota court characterizes as "the greatest change" since *Bellas Hess*. 470 N.W.2d at 209. This increase in sales volume has motivated North Dakota to argue, and its Supreme Court to agree, that interstate mail-order vendors have been

flourishing and that financially pressed State and local governments should therefore be allowed to tax their sales, even though they receive none of the benefits of State services that in-state retailers receive.

Amici are well aware of the need of State and local governments to increase tax revenues. Rhetoric about mail-order businesses seeking a "tax-free mail order haven" or a tax-free "niche," *id.* at 214-15, however, is no substitute for hard analysis as to whether North Dakota's taxation scheme is unconstitutionally burdensome, or whether other, less disruptive means of collecting use taxes exist, or, indeed, whether a costly system of uncoordinated, multijurisdictional use-tax collection, which would invite retaliatory "trade wars,"[3] is within the legislative prerogative of individual States rather than Congress.

The fact that many interstate mail-order businesses have succeeded financially in the years since *Bellas Hess* is reason to applaud that opinion, not to criticize it. *Bellas Hess* is anchored in the bedrock Commerce Clause belief that such an unrestrained circulation of commodities among the States would, as has in fact happened, open up and replenish "veins of commerce" in every State. *See* Hamilton, *The Federalist No. 11*.[4] Pejorative

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[3] Such a system would disproportionately benefit some States and disadvantage others. For example, four large State governments (California, New York, Texas, and Illinois) would receive approximately one-third of the additional tax revenues collected. Robert R. Nathan Associates, Inc., "An Economic Study of the Likely Impact of Overturning the *Bellas Hess* Decision on State Tax Revenues" 4 (1986). States that have a large proportion of mail-order sellers and/or that have no State use tax would be adversely affected, thus inviting retaliation. Prevention of such "trade wars" among the States is a major purpose of the Commerce Clause. *See generally Sporhase* v. *Nebraska ex rel. Douglas*, 458 U.S. 941 (1982); *A&P Tea Co.* v. *Cottrell*, 424 U.S. 366 (1976).

[4] *See also H.P. Hood & Sons, Inc.* v. *DuMond*, 336 U.S. 525, 539 (1949); Collins, *Economic Union As A Constitutional Value*, 63 N.Y.U.L. Rev. 43, 45 (1988).

terms such as "tax haven" and "tax-free niche" envince a fundamental disregard for what this Court has repeatedly extolled as the Commerce Clause's "guarantee of a free trade area among States." *American Trucking Ass'ns* v. *Scheiner*, 483 U.S. 266, 281 (1987); *see also id.* at 280, 283, 284; *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U.S. 318, 328 (1977).[5]

Furthermore, North Dakota's statute is not restricted to regulating the large success-stories of the mail-order business.[6] It reaches struggling and marginally successful firms as well as prosperous ones. It burdens new and emerging out-of-state vendors just as it hampers old and established ones. It conscripts small New Hampshire arts-and-crafts enterprises, Maine lobster cooperatives, and Delaware non-profit museums as well as large, multistate conglomerates. The only distinction North Dakota law makes—and it is hardly a distinction at all—is between those out-of-state vendors that transmit three or more mailings into the State over the course of any twelve-month period and those that send two or fewer.[7] Thus, North Dakota regulates every mail-order business—large or small—that makes the most minimal effort to reach North Dakota residents.

The reasoning of the opinion below depends upon the court's general assertion that *Bellas Hess* has been rendered obsolete by changes in technology since 1967. 470

[5] In this respect, as in others, the Framers were centuries ahead of their time: North Dakota asks this Court to authorize the erection of balkanizing trade barriers among the States at that precise moment in history when European nations are rushing to tear down such barriers as a means of reinvigorating their individual state economies. *See* "Making Europe a Mighty Market," N.Y. Times, May 22, 1988, at C1.

[6] In this important respect it differs from recent legislative proposals before Congress, to which we refer in the next Part of this brief. *See* H.R. 2230, 101st Cong., 1st Sess. (1989); S. 480, 101st Cong., 1st Sess. (1989).

[7] *See* 470 N.W.2d at 205 (citing N.D. Admin. Code § 81-04.1-01-03.1(3)).

N.W.2d at 215. Given the centrality of this contention, it is startling that the lower court opinion limits its discussion on the point to the *ipse dixit* that automated accounting systems and advancements in computer technology have greatly alleviated the burdens of collection. *Id.*[8] In fact, however, the cumulative burdens on interstate mail-order businesses would still be considerable today, particularly in view of the growth in the number of taxing entities and the complexity of their use-tax schemes. Indeed, the burdens would be even greater today for small and emerging businesses than they were in 1967.

The number of taxing jurisdictions has dramatically increased since 1967. At the time of *Bellas Hess*, approximately 2,300 jurisdictions were empowered to impose sales and use taxes. 386 U.S. at 759 & n.12.[9] Today, if State and local taxing authorities were permitted to follow North Dakota's lead, a mail-order vendor with sales in all fifty States could be required to comply with the use-tax regulations of approximately 6,500 State and

[8] The court does offer a "see" citation to three legal publications, but none of them justifies the court's conclusions. For example, the author of two of the three sources, Paul J. Hartman, not only advocates Congress's assuming an active role in this area, but also concludes that if this Court were to overturn *Bellas Hess* and there were no such congressional action, "compliance cost burdens associated with collecting and remitting the use tax in multiple jurisdictions would remain a serious problem, especially for the smaller out-of-state sellers." Hartman, *Collection of the Use Tax on Out-of-State Mail-Order Sales*, 39 Vand. L. Rev. 993, 1015 (1986). The other commentator relied upon by the court below, McCray, *Overturning Bellas Hess: Due Process Considerations*, 1985 B.Y.U.L. Rev. 265, 290 (1985), merely mentions in passing that computers ease administrative burdens, and then explicitly states that the cumulative-burdens issue is outside the scope of the article.

[9] Although data are not always available on use taxes *per se*, the Court pointed out that in most States local sales taxes are complemented by use taxes. *Id.* at n.12 (citing H.R. Rep. No. 565, 89th Cong., 1st Sess. 872 (1965)).

local jurisdictions.[10] In 1967, only eight different rates of sales and use taxes existed. *Id.* at 759 n.13. Today, States impose ninety different sales and use tax rates.[11] Statutes and regulations setting forth technical product classifications and detailed exemptions also abound.[12]

To be sure, there have been great advances in computer technology since 1967. As we explain below, however, these advances only go so far, and would be of least assistance to vendors who would be most imperiled financially by an overruling of *Bellas Hess*. Moreover, they cannot compensate for the additional cumulative costs that all out-of-state mail-order vendors would incur in advertising and printing; in lost or more complicated sales transactions; in fulfillment of post-transaction payment, reporting, and audit obligations; and indeed in obtaining counsel as to what taxes are due and to whom they should be paid. These are cumulative regulatory burdens that the various jurisdictions' tax laws do not impose on local businesses; imposing the burdens on mail-order vendors therefore would discriminate severely against them.

While times have changed, they have not changed so much so that the craftsmen, apparel manufacturers, developers of specialty items, booksellers, and thousands of other entrepreneurs who advertise their products by mail, many of whom cannot compete with big-company brands for retail shelf space, should be saddled with burdens that this Court for fifty years has held to be unconstitutional under the Commerce Clause. Nor have times changed so

[10] *See* Advisory Commission On Intergovernmental Relations, *State And Local Taxation Of Out-Of-State Mail Order Sales* 6 (1986).

[11] *See* [1991] 1A All-State Sales Tax Rep. (CCH) ¶¶ 19-005 to 19-056. Some of these rates extend into four and five digits— *e.g.*, 4.725, 5.9375, 6.0625, and 6.513 percent. *Id.* at ¶¶ 19-030, 19-036, 19-053.

[12] *See id.* at ¶¶ 8-305 *et seq.*

much that the Court should be indifferent to the economic effects of overruling *Bellas Hess*: some vendors would inevitably reduce the number of States in which they do business, while others would go out of the mail-order business altogether; jobs would be lost; access to certain products would be restricted; and, as a result of decreased competition among sellers, the price of many products would ineluctably rise.[13]

II. IF THERE IS TO BE ANY CHANGE IN THE BRIGHT-LINE RULE LIMITING USE-TAX COLLECTION TO ENTERPRISES HAVING A PHYSICAL PRESENCE IN THE TAXING STATE, CONGRESS MUST MAKE THAT CHANGE

This Court has recognized that if the Commerce Clause means anything, it is that fifty States cannot effectively regulate the complexities of interstate commerce. *See Bellas Hess*, 386 U.S. at 760.[14] When the Court deferred to Congress in *Bellas Hess*, it noted that Congress had shown an active interest in the area of state use-tax regulation of interstate businesses. *Id.* at 760 n.15. In recent years, Congress has again shown interest,[15] but has yet to be persuaded that *Bellas Hess* should be overturned. This Court should not authorize aggressive taxing States to do that which Congress so far has refused to allow.[16]

[13] *See generally* Mittelstaedt & Stassen, *The Macromarketing Effects of the Taxation of Interstate Mail-order Sales*, 11 J. Macromktg. 46, 53-55 (1991).

[14] *Accord H.P. Hood & Sons, Inc.* v. *DuMond*, 336 U.S. 525, 534 (1949) ("The necessity of centralized regulation of commerce among the states was so obvious and so fully recognized that the few words of the Commerce Clause were little illuminated by debate").

[15] *See supra* note 6.

[16] In the analogous area of State taxation of income derived from interstate commerce, Congress has acted and has rejected an "economic presence" test. *See* 15 U.S.C. § 381 (States cannot tax

Article I, Section 8 makes clear that the intricacies of interstate commerce are properly the subject of legislative, not judicial, regulation.[17] No one can seriously dispute the need to exempt modest-sized out-of-state businesses from the burdens of complying with the regulations of thousands of use-tax schemes. Yet precisely how such an exemption should be crafted is uniquely a legislative task. A judicially created, case-by-case "economic presence" test—borrowing, as it does, from this Court's highly fact-specific "minimum contacts" due process jurisprudence—is no answer: it is too amorphous, invites too much (and too expensive) litigation, and diverts attention from the fundamental economic issues with which the Commerce Clause is concerned, such as the cumulative effects of a State regulation upon interstate commerce. Only Congress could substitute a workable "economic presence" rule for the bright-line "physical presence" test of *Bellas Hess*. *See, e.g.*, S. 480, 101st Cong., 1st Sess., § 2 (1989) (permitting States to require use-tax collection by interstate businesses whose total annual U.S. sales exceed $12.5 million or whose sales in the taxing State exceed $500,000). Similarly, Congress alone is qualified to propose a comprehensive solution to the problem of disuniformity among State and local use-tax schemes. *See id.* at § 3 (requiring uniform rates among all of the local jurisdictions within a State as a prerequisite to those jurisdictions' being able to reach out-of-state businesses).

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income derived from the solicitation of orders which are sent outside the State for approval and which are to be filled by delivery from out-of-state vendors). Indeed, Congress believed that limits on State authority were necessary to address the "burdens of compliance" on out-of-state companies. S. Rep. No. 658, 86th Cong., 1st Sess. (1959), 1959 U.S. Code Cong. & Adm. News 2548, 2549-50.

[17] Article I, § 8, gives Congress the authority to "regulate Commerce * * * among the several States." The Court's practice of deferring to Congress in this area has made review of congressional action under the Commerce Clause largely a formality. L. Tribe, *American Constitutional Law* § 5-8 (2d ed. 1988).

III. NORTH DAKOTA'S TAXING SCHEME IMPOSES UNCONSTITUTIONAL COLLECTION, REPORTING, AND PAYMENT OBLIGATIONS ON OUT-OF-STATE MAIL-ORDER BUSINESSES

The above discussion explains why the Court should continue to resolve cases such as this under the "physical presence" standard rather than under a vague economic rule that would encourage litigation in a myriad of individual cases. Even if the Court were to examine anew the constitutional question raised by the North Dakota statute—as it need not do—the Court should reach the same conclusion it reached in 1967 in *Bellas Hess*. That is, any State use-tax collection statute would be inconsistent with the Commerce Clause if applied to vendors having no physical presence in the taxing State. Thus, the Court should reaffirm the "physical presence" test. Failure to do so would be to authorize a full-blown economic analysis every time a State develops a novel theory by which to regulate out-of-state businesses. The result would be years of costly and widespread litigation.

A. The Commerce Clause Prohibits State And Local Regulatory Requirements Whose Cumulative Effects Unjustifiably Burden Interstate Commerce

Bellas Hess rests upon the core proposition that some State taxes or regulations, even if not obviously discriminatory in themselves, would create cumulative burdens on interstate commerce that are unacceptable under the Commerce Clause if adopted by enough States (or local jurisdictions). The Court concluded in *Bellas Hess* that, whether or not the burdens placed upon interstate mail-order businesses by Illinois' use-tax scheme, standing alone, were impermissibly high, the cumulative burdens that would have been created if other States and local taxing authorities had been allowed to enact similar schemes would have been unjustifiable. "[I]f Illinois can impose such burdens," the Court reasoned, "so can every

other State, and so, indeed, can every municipality, every school district, and every other political subdivision throughout the Nation with power to impose sales and use taxes." 386 U.S. at 759.

Given the variations in State and local tax rates, allowable exemptions, and administrative and recordkeeping requirements, the Court concluded in *Bellas Hess* that allowing State and local taxing authorities to compel out-of-state mail-order businesses with no physical presence in their respective jurisdictions to collect, record, and remit use taxes pursuant to their different use-tax schemes, would have unconstitutionally entangled those vendors in a web of complicated obligations to local jurisdictions. *Id.* at 759-60.

Weighing the cumulative burdens on interstate commerce in order to determine the constitutionality of a given practice conforms with longstanding Commerce Clause jurisprudence. *See, e.g., Nippert* v. *City of Richmond*, 327 U.S. 416, 430, 431 (1946); *Western Live Stock* v. *Bureau of Revenue*, 303 U.S. 250, 255 (1938). It has recently been employed by this Court to invalidate State economic regulation and tax schemes. *See Healy* v. *Beer Institute, Inc.*, 491 U.S. 324, 336 (1989) (evaluation of a statute under the Commerce Clause must include inquiry into "what effect would arise if not one, but many or every, State adopted similar legislation"); *American Trucking Ass'ns* v. *Scheiner*, 483 U.S. 266, 285 & n.20 (1987).

In *Nippert*, for example, the Court struck down a city ordinance imposing a license fee on local and non-local solicitors alike because of the cumulative burdens such a practice, if adopted elsewhere, would place upon interstate businesses:

> [T]he cumulative effect, practically speaking, of flat municipal taxes laid in succession upon the itinerant merchant as he passes from town to town is obviously greater than that of any tax of statewide application

> likely to be laid by the legislature itself. And it is almost as obvious that the cumulative burden will be felt more strongly by the out-of-state itinerant than by the one who confines his movement within the State or the salesman who operates within a single community or only a few.

327 U.S. at 429-30.

Similarly, this Court examined the cumulative effects of a Pennsylvania tax statute in *Scheiner*. That statute imposed facially neutral flat taxes equally upon in-state and out-of-state trucks traveling Pennsylvania highways, although Pennsylvania trucks on average traveled five times as many miles on Pennsylvania highways as did out-of-state trucks. "In practical effect," the Court reasoned, the taxes "impose a cost per mile on [out-of-state] trucks that is approximately five times as heavy as the cost per mile borne by local trucks * * *." 483 U.S. at 286.[18] The Court emphasized that if every State enacted similar legislation, there would be "no conceivable doubt that commerce among the States would be deterred." *Id.* at 284-85 & nn.16, 20 (citing *Nippert* with approval). The Court consequently concluded that Pennsylvania's flat-tax statute was discriminatory, posed "manifold threats to the national free trade area," and therefore violated the Commerce Clause. *Id.* at 285-86.

This Court's Commerce Clause decisions also make clear that the cumulative costs of compliance with different State and local regulations can make an otherwise constitutional statute unconstitutional. The compliance costs in *Bellas Hess* related to an out-of-state seller's keeping itself abreast of the variations in State and local tax rates and allowable exemptions, and to additional administrative needs and recordkeeping obligations. 386

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[18] *See also* 483 U.S. at 296 ("imposition of the flat taxes for a privilege that is several times more valuable to a local business than to its out-of-state competitors is unquestionably discriminatory and thus offends the Commerce Clause").

U.S. at 759-60. The principle that such compliance costs can lead to a statute's invalidation under the Commerce Clause also long predates *Bellas Hess*. *See Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 773-74 (1945).

Given this solid doctrinal foundation upon which *Bellas Hess* rests, the North Dakota Supreme Court had no basis for dismissing it as obsolete. The court's attempt to demonstrate that "the legal landscape" has changed since *Bellas Hess*, 470 N.W.2d at 209-13, is altogether unconvincing. For example, the court suggests that *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977), undermines *Bellas Hess*. *See* 470 N.W.2d at 209-11. It does not. Unlike Petitioner, Complete Auto was physically present in the taxing State and did not even contend that there was an insufficient nexus with the taxing State. 430 U.S. at 277-78.[19] Moreover, the present case concerns a State's regulatory authority to require out-of-state businesses to collect and remit State taxes levied upon others,

[19] There is no disputing the fact that, like Bellas Hess, out-of-state mail-order vendors such as Petitioner do not utilize such State and local services as fire and police protection, transportation facilities, or public roads. The North Dakota court placed considerable weight on the notion that North Dakota provides trash collection services that indirectly benefit mail-order sellers insofar as the State or local government disposes of catalogs mailed to North Dakota residents. 470 N.W.2d at 218-19. There are at least three major problems with the court's transforming this notion into a conclusion that North Dakota's statute is, for this reason, constitutional. First, it proves too much: *every* interstate business that utilizes the postal service transmits material requiring disposal in the destination State. Second, such an attenuated connection to the taxing State is fundamentally different from a business's taking direct advantage of State services. It may be that the mailings impose some costs on the State where the recipients live, but that does not constitute a service or benefit to the *mailer*. Third, as we discuss in the text, this sort of "minimal contacts" due process analysis is inappropriate for Commerce Clause purposes because it unduly distracts attention from the central economic questions with which the Commerce Clause is concerned—the actual impact on interstate commerce of a given State regulatory requirement.

not, as in *Complete Auto*, a State's authority to require an out-of-state business to pay a tax itself.

The most fundamental error in the North Dakota court's reliance on *Complete Auto*, however, is that the four-part test articulated there is fully consistent with *Bellas Hess*. *Complete Auto* held that a tax will pass muster under the Commerce Clause *only* if the tax: (1) is applied to an activity that has a substantial nexus with the taxing State, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services provided by the State. *Id.* at 279; *see also D.H. Holmes Co.* v. *McNamara*, 486 U.S. 24, 31 (1988). This Court has subsequently made clear—*e.g.*, in *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 625-26 (1981)—that *Bellas Hess* is the touchstone of the first prong ("substantial nexus") of the *Complete Auto* test. Here, as in *Bellas Hess*, there is no sufficient nexus to support a tax-collection requirement, without even reaching the burdens that are relevant to other prongs of the *Complete Auto* test.

North Dakota's tax scheme fails at least two other prongs of the *Complete Auto* test. As we demonstrate below, the scheme imposes discriminatory burdens in its operation against out-of-state businesses, and the tax-collection obligations it creates are not "fairly related to the services provided by the State." [20]

[20] The other cases the North Dakota court offered as evidence of an altered legal landscape also do not support its conclusion. In each case the out-of-state business maintained a physical presence in the taxing State. For example, D.H. Holmes Co. was properly required to pay a Louisiana use tax on catalogs delivered into Louisiana from out-of-state printers because D.H. Holmes was a Louisiana corporation, owned and operated thirteen stores in Louisiana, and employed approximately 5,000 workers in the State. *See D.H. Holmes Co.* v. *McNamara*, 486 U.S. at 26, 32. Similarly, the out-of-state manufacturer in *Tyler Pipe Indus., Inc.* v. *Washington State Dep't of Revenue*, 483 U.S. 232, 250-51 (1987), maintained

B. The Substitution Of An "Economic Presence" Rule For The "Physical Presence" Test Of *Bellas Hess* Would Create Unconstitutional Cumulative Burdens On Interstate Commerce

1. *Increased advertising and printing costs*

Mail-order businesses incur substantial costs in publishing and mailing catalogs and in purchasing advertising space in newspapers, magazines, and other publications. The more advertising space the companies need in order to explain tax information to consumers, the greater these costs. One of the consequences of overruling *Bellas Hess* would be to force out-of-state mail-order companies to purchase considerable additional advertising space so as to provide purchasers with necessary use-tax information.

If every State and local taxing authority adopted a use-tax provision like that of North Dakota, a mail-order business selling its goods nationally would be required to list and explain all potentially applicable tax rates, classifications, and exemptions, as well as to identify separately those States that apply their tax rates to shipping and handling charges and those States that do not.[21] Explanation of exemptions, which are often of dizzying complexity, would be particularly cumbersome. As this Court

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active sales representatives in the taxing State, and the companies in *National Geographic Soc'y* v. *California Board of Equalization*, 430 U.S. 551 (1977), and *Standard Pressed Steel Co.* v. *Washington Dep't of Revenue*, 419 U.S. 560 (1975), operated offices or had employees in the taxing States.

[21] *See Interstate Sales Tax Collection Act of 1987 and the Equity in Interstate Competition Act of 1987: Hearings on H.R. 1242, H.R. 1891, and H.R. 3521 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 100th Cong., 2d Sess. 207, 234 (1988) ("*1988 Hearings*") (statement and testimony of William T. End, then-Executive Vice-President of L.L. Bean, Inc.).

pointed out in *Bellas Hess*, 386 U.S. at 759-60 & n.14, determining which items are exempt under a particular State's law is often unclear, and may be beyond the capacity of any mechanical system.[22] Pennsylvania, for example, does not tax "clothing," but does tax clothing "accessories," "formal day or evening apparel," and "sporting goods and clothing not normally used or worn when not engaged in sports."[23] Some States tax certain kinds of food, but not others.[24] California, which aggressively enforces its complex use-tax laws, has recently amended them to tax "snack foods" while exempting "food products"; "Ritz crackers are deemed taxable, but saltine crackers are not."[25] Taxing jurisdictions also frequently grant exemptions on the basis of a purchaser's identity; thus, out-of-state vendors must track which charitable organizations each jurisdiction exempts. *See, e.g.*, 72 Pa. Stat. Ann. § 7204(10).

Printing single-state or regional catalogs would not solve the problem because it costs more to print numerous regional or single-state catalogs and because, in order fully to inform consumers, those catalogs would still have

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[22] More recently, some witnesses before Congress have testified that computer tax programs are not able to recognize tax exemptions for products, which vary by jurisdiction, or judge whether products fit within a given exemption. *See, e.g., Interstate Sales Tax Collection Act of 1987: Hearing on H.R. 1242 Before the Subcomm. on Select Revenue Measures of the House Comm. on Ways and Means*, 100th Cong., 1st Sess. 178 (1987) (testimony of Heath Kline); *Collection of State Sales and Use Taxes by Out-of-State Vendors: Hearing on S. 639 and S. 1099 Before the Subcomm. on Taxation and Debt Management of the Senate Comm. on Finance*, 100th Cong., 1st Sess. 53 (1987).

[23] 72 Pa. Stat. Ann. § 7204(26).

[24] *See, e.g.*, N.D. Century Code § 57-40.2-04.1 (1991 Supp.).

[25] "Sales Tax Nightmare on Main Street," Forbes, Sept. 30, 1991, at 37; *see* Cal. Rev. & Tax Code § 6359, as amended by ch. 88, S.B. No. 179.

to contain complete nationwide tax information. This is so because most States require mail-order vendors to collect the use tax of the jurisdiction to which goods are sent. Thus, when a purchaser instructs the vendor to deliver the goods to another person—which often occurs in the case of gifts—the purchaser must be told how to calculate the use tax of every possible destination jurisdiction.[26] This is a significant problem, among other reasons, because mail-order businesses derive between sixty and seventy-five percent of their total revenues during the holiday gift season.[27]

2. *Diminished sales, increased collection costs, and increased payments to cover taxes unremitted by customers*

Ideally, a mail-order customer reads the advertisement or catalog to determine the size of the payment he or she should remit, calculates the amount of any applicable tax, and pays the total amount due.[28] As the complexities of determining the applicable tax rate and the scope of possible exemptions increase, however, so does the burden on the consumer in accurately calculating the tax amount and the resulting total price. The result is an increase in

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[26] [I]f I order three presents from Talbot's and have it sent to a brother in New Jersey, a brother in Texas, and a sister in Wisconsin, I have to calculate a separate tax rate for each of those items, I have to look under each State's exemptions to determine whether clothing is exempted or is not in that State, I have to check each State to know whether or not the postage handling charge is or is not exempted from the State. I then have to make all of those calculations and run a total.

1988 Hearings at 234 (testimony of William T. End).

[27] *See* "The War of the Christmas Catalogues," N.Y. Times, Nov. 15, 1991, at D1.

[28] *See* Note, *Collecting the Use Tax on Mail-Order Sales*, 79 Geo. L.J. 535, 540 (1991).

lost sales as potential purchasers become discouraged,[29] and—as more and more purchasers underpay or fail to pay any tax—increased collection costs[30] and increased payments to the taxing State by the vendor out of its own pocket to cover deficiencies.[31]

These problems are somewhat mitigated when the mail-order customer pays by credit card, because then the customer can furnish the mail-order vendor with an account number and rely upon the vendor to calculate correctly all applicable use taxes. But this flexibility in credit-card sales is of limited value because nearly fifty percent of mail-order customers pay by check.[32] And any such open-ended payment arrangement is bound to result in customer resistance, inquiries, and disputes. Also, the additional cost of collecting unpaid taxes is particularly burdensome for a mail-order vendor with inexpensive products or few orders.[33] *See* Note, *Collecting the Use Tax on Mail-Order Sales*, 79 Geo. L.J. 535, 540 (1991).

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[29] *See 1988 Hearings* at 206 ("The success of direct marketing depends upon making the transaction as simple as possible. Once we make mail order complex and confusing for our customers, we discourage their doing business with us.") (statement of Willliam T. End).

[30] *1988 Hearings* at 89 (testimony of Direct Marketing Association). Some direct marketers experience an approximately nine-percent underpayment by customers of the total taxes due. *Id.*

[31] Since statutes such as North Dakota's hold the mail-order vendor liable whether or not the State resident encloses the proper use-tax sum, the mail-order vendor faces the following choices when there is mispayment or nonpayment by the consumer in a check transaction: return the order to the customer and request full payment (thereby endangering the sale), fill the order and request the customer to remit the tax in a second check, or pay the tax for the customer.

[32] *1988 Hearings* at 86 (testimony of Direct Marketing Association).

[33] A study by a national accounting firm concludes that the single most significant variable affecting collection costs is size of the

3. *Increased administrative and audit costs*

Just as out-of-state mail-order companies would be required to remit taxes, directly or indirectly, to as many as 6,500 different jurisdictions, so too would they have to comply with a host of uncoordinated recordkeeping and record-production requirements of those jurisdictions. Computers could help generate records, but companies still would have to purchase the necessary computer software and the annual software renewal, and would have to hire personnel to input data, operate the computers, and remit the taxes. Even small companies would be subject to time-intensive, business-disrupting audits by a myriad of different taxing jurisdictions.

4. *Increased expenses to determine where taxes are due*

Under the bright-line "physical presence" test of *Bellas Hess*, a mail-order company has a fairly clear idea of when it is subjecting itself to a jurisdiction's requirement to collect use taxes. By contrast, under an amorphous "economic presence" rule, a vendor would have to retain counsel to educate itself as to the probabilities of whether —under a particular State's statutory scheme and federal case law—the company's contacts with customers in that State are sufficient for the State to hold the company liable for the collection of use taxes. A vendor would also have to decide whether to incur the costs of overpaying or to risk incurring litigation expenses and possible penalties. Such expenses are obviously particularly burdensome for smaller vendors.

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company. The larger the company, the smaller the cost of collection (generally) as a percentage of total sales or of taxes collected. *1988 Hearings* at 87 (testimony of Direct Marketing Association).

C. North Dakota Has Available To It A Less Burdensome Alternative Means For Collecting Use Taxes From Mail-Order Customers

Even in the absence of congressional action, States such as North Dakota have alternative constitutional ways of taxing the use of products shipped in-state by out-of-state mail-order vendors. Maine, for example, requires its residents to calculate use-tax liability when completing their annual tax returns, which include a specific line-item for a use-tax declaration.[34] Taxpayers who do not know the exact amount they owe, or cannot be bothered to calculate it, are permitted simply to multiply their adjusted gross income by .0004 [35] and report the resulting figure as their use-tax liability. The State makes the computation and automatically adds the tax to the taxpayer's total tax liability if the taxpayer fails to compute the tax. The success Maine has had in collecting use taxes illustrates that other collection mechanisms are available to States. The virtue of Maine's system, of course, is that it does not impermissibly burden interstate commerce. North Dakota's system, on the other hand, does, and it should be declared unconstitutional for the reasons articulated by this Court in *Bellas Hess*.

IV. ALTERNATIVELY, IF THE COURT WERE TO OVERRULE *BELLAS HESS* AND ADOPT A NEW RULE, THE COURT SHOULD EXPRESSLY STATE THAT THE NEW RULE WOULD HAVE ONLY PROSPECTIVE EFFECT

If this Court were to adopt a new rule (*e.g.*, an "economic presence" rule) and not expressly make it non-

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[34] *See* Me. Rev. Stat. Ann. tit. 36, § 1861-A. Line 14 on Maine's 1040 short form and line 19 on the long form require taxpayers to calculate and to declare any outstanding use tax liability for the preceding year.

[35] The tax rate of .0004 is based upon the application of the Maine sales tax rate to the national yearly average of mail-order purchases.

retroactive, the Court's recent decision in *James B. Beam Distilling Co.* v. *Georgia*, 111 S. Ct. 2439 (1991), suggests that lower courts would have to apply that new rule retroactively in other similar cases. This could result in crushing back-tax and tax-penalty liability for mail-order vendors in the *amici* States who had a right to rely on *Bellas Hess* and the "physical presence" test. *See generally Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971). One State has already notified out-of-state vendors of its intention to issue assessments for past liability in the event this Court were to overrule *Bellas Hess*.[36]

Amici therefore would urge the Court, in the event the Court were to depart from a "physical presence" standard, to make explicit, in accordance with its usual practice when overruling clear past precedent, *see Chevron Oil*, 404 U.S. at 106, that mail-order companies with no physical presence in a taxing State would not be subject to liability for use taxes and penalties related to sales made prior to the date of this Court's decision.[37] This would, *inter alia*, avoid prolonged uncertainty and vexatious and costly litigation by States seeking to enhance their revenues.

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[36] Notice, dated November 15, 1991, from William D. Marshall, Acting Administrator, Sales and Use Tax Division, Ohio Department of Taxation (noting that few court decisions are only prospective, and announcing the Department's intention to issue assessments on sales made over many years if this Court affirms the lower court's decision).

[37] Although the Court did not grant certiorari on the retroactivity question presented by Petitioner, we understand *James B. Beam Distilling Co.* to hold that the issue of retroactivity as a choice of law is implicit in every case.

CONCLUSION

For the foregoing reasons, *amici* respectfully request this Court to reverse the judgment below. Alternatively, *amici* request that any affirmance of the decision below make clear that mail-order vendors having no physical presence in a taxing State may not be held liable for use taxes and penalties related to sales made prior to the date of this Court's decision.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

QUILL CORPORATION,

Petitioner,

v.

STATE OF NORTH DAKOTA,
By and Through Its Tax Commissioner,
Heidi Heitkamp,

Respondent.

On Writ of Certiorari to the Supreme Court of North Dakota

**BRIEF AMICI CURIAE OF
AMERICAN COUNCIL FOR THE BLIND
AMERICAN COUNCIL OF BLIND LIONS
AMERICAN AGRICULTURE MOVEMENT, INC.
AMERICAN ASSOCIATION OF HOMES FOR THE AGING
DISABLED AMERICAN VETERANS
INDEPENDENT LIVING FOR THE HANDICAPPED, INC.
NATIONAL ASSOCIATION FOR HOME CARE
NATIONAL ASSOCIATION OF PEOPLE WITH AIDS
NATIONAL COMMITTEE TO PRESERVE SOCIAL SECURITY AND MEDICARE
NATIONAL GRANGE
NATIONAL INDIAN YOUTH COUNCIL, INC.
PARALYZED VETERANS OF AMERICA
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-194

QUILL CORPORATION,

Petitioner,

V.

STATE OF NORTH DAKOTA,
By and Through Its Tax Commissioner,
Heidi Heitkamp,

Respondent.

On Writ of Certiorari to the Supreme Court of North Dakota

BRIEF AMICI CURIAE IN SUPPORT OF PETITIONER

INTERESTS OF AMICI CURIAE

A. Amici

AMERICAN COUNCIL FOR THE BLIND

The American Council for the Blind is a District of Columbia nonprofit organization that was founded in 1961. Its membership consists of tens of thousands of the blind and visually impaired. The Council has 52 state and regional affiliates and 21 national special

interest and professional affiliates. The Council strives to improve the well-being of all blind and visually impaired people by, *inter alia*, improving educational and rehabilitation facilities and opportunities and attempting to maximize the access of the blind and visually impaired to all services and facilities, both public and private.

AMERICAN COUNCIL OF BLIND LIONS

The American Council of Blind Lions is an organization of LIONS (members of LIONS Clubs International) who are blind or visually impaired. There are members of the organization throughout all 50 United States. The purpose of the organization is to attempt to ensure that the LIONS Clubs International continue the challenge of Helen Keller to be the knights of the blind, and to seek to ensure that necessary services and supplies are provided to the blind.

AMERICAN AGRICULTURE MOVEMENT, INC.

The American Agriculture Movement, Inc. is a 501(c)(5) organization incorporated as a nonprofit corporation in the State of Arkansas. Its purpose is to represent family farmers to permit the continuation of the small family farm. The wide-spread availability of mail order merchandising, providing an array of products at reasonable prices, is important to the continuation of the family farm.

AMERICAN ASSOCIATION OF HOMES FOR THE AGING

The American Association of Homes for the Aging is a national nonprofit 501(c)(3) trade association, incorporated in the State of New York. It represents 4,000 not-for-profit facilities providing health care,

housing, continuing care retirement programs, and community services to more than 500,000 older individuals. Its activities include enhancing its members' financial strength and ensuring that the needs of its elderly constituencies are met.

DISABLED AMERICAN VETERANS

The Disabled American Veterans is a Congressionally chartered nonprofit organization of disabled veterans with members throughout the nation. Additionally, there are 200,000 members of the DAV Auxiliary. The organization provides a broad spectrum of services free of charge to disabled veterans and members of their families, with a strong emphasis on assisting these veterans and families in obtaining earned benefits as a result of their military service.

INDEPENDENT LIVING FOR THE HANDICAPPED, INC.

Independent Living for the Handicapped, Inc. (ILH) is a 501(c)(3) organization chartered in the District of Columbia. Its purpose is to help physically disabled, mentally normal adults live independent lives in the community instead of totally dependent lives in institutions. Primary efforts are in behalf of mobility-impaired people who use wheelchairs. ILH operates a single-family residence that accommodates five people using wheelchairs and one 20-unit apartment house that was specifically designed and built for wheelchair users.

NATIONAL ASSOCIATION FOR HOME CARE

The National Association for Home Care ("NAHC"), based in Washington, D.C., represents the interests of home care patients and providers of such services

nationwide. Since 1981, NAHC has maintained its mission to improve access to home care services as a humane, viable, and cost-effective alternative for chronically ill children. NAHC's membership includes individuals, professional caregivers, providers of home care services, and organizations interested in providing care in the home setting. NAHC has been in the forefront of home care patient advocacy efforts nationwide in legislative, regulatory, and judicial forums. For example, it was NAHC, on behalf of home care patients across the country, which successfully challenged the attempted dismantling of the Medicare home health benefit by the federal Health Care Financing Administration in *Duggan v. Bowen*, 691 F. Supp. 1487 (D.D.C. 1988).

NATIONAL ASSOCIATION OF PEOPLE WITH AIDS

The National Association of People with AIDS, a District of Columbia nonprofit corporation, is a national nonprofit, 501(c)(3) organization chartered to represent the voice of people living with HIV disease in the United States. Through programs in information and referral, technical assistance, and advocacy, the organization seeks to empower the HIV-infected community and works to ensure that the needs of those infected are adequately addressed by both the private and public sectors. NAPWA counts as its constituency the 1.5-million Americans currently living with HIV disease.

NATIONAL COMMITTEE TO PRESERVE SOCIAL SECURITY AND MEDICARE

The National Committee To Preserve Social Security and Medicare is a District of Columbia nonprofit

corporation with about five million members and supporters throughout the United States. Its purpose is to represent, protect, and promote the interests of its millions of members under the Federal Old Age, Survivors and Disability Insurance Program and the Medicare Program. Its purposes include promoting its members' health and welfare, quality of life, pensions, and interests related thereto.

NATIONAL GRANGE

The National Grange is a rural community service organization with a special interest in agriculture. The Grange is a nonprofit organization headquartered in Washington, D.C. with approximately 325,000 members. Founded in 1897, it is the country's first general farm organization. Its purposes include attempting to ensure the well-being of its members as rural residents. The continued vitality of mail order merchandising is particularly important to its rural members.

NATIONAL INDIAN YOUTH COUNCIL, INC

The National Indian Youth Council, Inc. is a New Mexico nonprofit corporation which was founded in 1961. It has over 15,000 members nationwide. Its purpose is to enhance and preserve the rights of Indian people in a broad variety of areas including preserving Indian culture and assisting its members in the private and public sectors of the country. Its members are dominantly rural.

PARALYZED VETERANS OF AMERICA

The paralyzed Veterans of America (PVA) is a nonprofit organization chartered by the Congress of the United States. The statutory purposes of PVA include

the formation of an association for the benefit of persons who have suffered spinal cord injury or disease, the promotion of medical research in several fields connected with the disabilities shared by the membership and acquainting the public with the needs and problems of paraplegics. PVA has over 15,000 members and has thirty-three chapters and thirteen subchapters throughout the United States and Puerto Rico.

PVA is dedicated to servicing the needs of its members—all of whom suffer from catastrophic paralysis caused by spinal cord injury or disease. To advance the needs and legal rights of its members, PVA has for years been active in litigation and administrative and legislative advocacy on behalf of persons with disabilities. It has initiated or joined in legal action to advocate the interests of its members in actions concerning transportation, housing, equal access in public accommodations, education, and other related issues.

THE FIGHT BACK! FOUNDATION FOR CONSUMER EDUCATION

The Fight Back! Foundation for Consumer Education is an organization that seeks to increase consumer awareness. It works with business and consumer groups and various government agencies to attempt to resolve major issues in the marketplace.

VETERANS OF FOREIGN WARS OF THE U.S.A.

The Veterans of Foreign Wars of the U.S.A., chartered as a nonprofit corporation by the United States Congress, was founded in 1899 and has over 2.2 million members throughout the United States. There

are over 10,000 local affiliates. The VFW engages in a wide variety of activities on behalf of its members and also promotes numerous charitable activities. Its purposes include attempting to ensure that its members have maximum access to the goods and services of the American marketplace. Many of the members are elderly or disabled. Those persons benefit greatly from shopping by mail order.

VIETNAM VETERANS OF AMERICA, INC.

Vietnam Veterans of America, Inc. (VVA) is a nonprofit veterans service organization incorporated in New York state and nationally headquartered in Washington, D.C. There are over 43,000 members in all 50 states with some 516 individually incorporated active affiliate chapters. The purpose of the organization is to provide services to veterans whether or not they are members of VVA. In particular, veterans are helped to develop claims for federal benefits administered through the Department of Veterans Affairs (VA). In addition, many of VVA's chapters offer employment and training assistance, develop and foster programs for homeless and other economically disadvantaged veterans and promote the organization's legislative agenda before the United States Congress and the Executive Branch.

VISUALLY IMPAIRED DATA PROCESSORS INTERNATIONAL

Visually Imparied Data Processors International is a District of Columbia nonprofit organization of blind and visually imparied data processing professionals. The organization seeks to assist its members by enhancing and promoting the abilities of blind people in

the field of data processing. It has members throughout the United States. The organization is vitally concerned with hardware, software, and data processing accessories many of which are purchased through mail order.

WORLD INSTITUTE ON DISABILITY

The World Institute on Disability was founded in 1983. Its purpose is to assist in seeking solutions to problems of those who are disabled. It is particularly interested in assisting the disabled, including the disabled elderly, in promoting equality of opportunity and full and equal participation within all facets of the economic and social life of the country.

B. General Statement

Many of the Amici parties to this brief are organizations seeking to assist those suffering from various kinds of disabilities or burdened by special consumer challenges. For the consumers represented by those organizations, the continued existence of a healthy mail order industry goes beyond even the laudable goal of ensuring maximum consumer choices. For persons unable to utilize retail facilities to purchase the products necessary for day-to-day life, the availability of a wide range of mail order goods is more than a convenience; it is a necessity.

The disabled population of this country is substantial. There are over 32 million U.S. residents with serious activity-limiting conditions. *Statistical Abstract of the United States* at 119 (110th ed. 1990). All consumers have an interest in maintaining a maximum degree of competition to ensure both reasonable prices and a wide range of products. For those for

whom ordinary shopping is difficult or impossible, products necessary for a reasonable life will remain available only if the mail order industry remains healthy and competitive. This applies not only to such mundane items as clothing or housewares but also to products needed in order to cope with particular disabilities.

For example, many mail order consumers suffer mobility impairment. Virtually all of these consumers require the use of specialized medical equipment and other assisting devices to aid them in their day-to-day activities. Because the number of manufacturers and suppliers of these devices is relatively small, those consumers rely, to a great extent, on ordering such items through the mail. Because of their mobility impairment, many of these consumers also shop for everyday items by mail.

Additionally, because of their disabilities, many are unable to engage in sustained gainful employment. These consumers exist on the fixed incomes provided by various forms of disability benefits.[1] The interest of these Amici is to ensure the continued availability of a wide range of mail order retailers and to guard against the certain increase in the cost of items purchased through the mail if the burden of tax collection is placed on mail order businesses.

Like those facing paralysis and other permanent physical challenges, the many persons with illnesses

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[1] Households with less than $30,000 annual income comprise 37.9% of mail order consumers, and nearly one-third of mail order consumers are fifty years old or older. *Simmons Study of Media and Markets* (Simmons Market Research Bureau 1990). It is a myth that mail order buyers are predominantly wealthy individuals buying expensive, luxury products.

who seek to receive care at home also depend on mail order purchases. The development of access to home care services includes efforts to eliminate obstacles to that care. Since individuals receiving home care are often completely homebound, it is necessary that all the vital elements to living be brought into the individual's home. Tasks which are simple for most people, such as running an errand to the corner store, are literally impossible for individuals who are bed-bound, confined to wheelchairs, dependent upon medical equipment and services simply to survive to the next day.

Allowing the imposition of sales tax for out-of-state, mail order purchases would impede the feasibility of home care. If access to goods is restricted by reducing the viability of mail order merchandising by imposing sales tax obligations upon non-resident businesses, the ability of home care patients to remain in their homes will be correspondingly reduced. Likewise, the increased costs of mail order products that would result from the additional administrative burdens upon mail order merchandisers would limit home care for patients with limited incomes and resources.

The Amici therefore have a keen interest in the matter before the Court because any change to the time-honored standard set by the Court in *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967) would cause a direct, substantial, and negative impact on all mail order consumers—and particularly specially challenged consumers—and the market in which they function. Retreating from *Bellas Hess* would substantially increase the administrative costs for mail order companies, and would cause the companies either to go out of business or to attempt

to pass along the costs to the mail order consumer. Either result would restrict the access of mail order consumers to this vital segment of the retail market. A reversal of *Bellas Hess* would also make it more complicated for consumers to purchase by mail.

The mail order market provides a valuable and often indispensable service to all types of consumers. Again, a significant portion of mail order consumers are persons with limited ability to shop by conventional means,[2] and many national direct marketing companies offer products specifically tailored to the needs of consumers such as the elderly and the disabled.[3] These companies offer specialized products for which local demand often would not support a retail store. The availability of mail order products results in a better variety of products at more competitive prices than are available through local retail outlets.

Further, for rural residents, many products are un-

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[2] *See Interstate Sales Tax Collection Act of 1987 and the Equity in Interstate Competition Act of 1987: Hearings on H.R. 1242, H.R. 1891, and H.R. 3521 Before the Subcommittee on Monopolies and Commercial Law*, 100th Cong., 2d Sess., 222 (testimony of Cyril Brickfield, Honorary President and Former Executive Director of the American Association of Retired Persons) ("Increased sales tax collection would be particularly costly to those who are most dependent on mail order purchases; the very old, the homebound, the handicapped, and those who live in rural areas [for whom] there is often no practical alternative but mail order. . . . Statistics by the Bureau of Census demonstrate that these dependent people are more likely to be low income than any other portion of the population.").

[3] There are more than 26 million Americans, 65 or older, with functional limitations. *Statistical Abstract of the United States* at 120 (110th ed. 1990.)

available at any price in local retail facilities.[4] In the absence of a viable mail order industry, rural consumers would simply not be able to enjoy the full array of merchandise that is available in the American marketplace. The mail order merchandising made possible by *Bellas Hess* has resulted in a broad array of goods for rural consumers that previously were beyond their reach. In addition, single parents, working parents, and those who cannot afford child-care also rely heavily on mail order purchases. The critical availability of goods to all of these consumers would be severely threatened by a reversal of *Bellas Hess* and the inevitable decline in mail order merchandising that would result therefrom.[5]

Mail order opportunities enrich the marketplace by providing greater choices to consumers.[6] Competition

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[4] Rural residents comprise 23.4% of mail order consumers. *Simmons Study of Media and Markets* (Simmons Market Research Bureau 1990).

[5] Reversal of *Bellas Hess* could result in many mail order companies refusing to continue to offer their products in those states in which the population levels or the complexity of the tax code made it no longer economically feasible to continue to serve that market. This would constitute an additional threat to the disabled and rural consumers since it would be the sparsely populated states, which generally have fewer products available in retail markets, that would most likely be cut off from further mail order merchandising.

[6] Mail order companies also facilitate wide dissemination of reading and educational materials, often to consumers that could not otherwise obtain such materials. Because many mail order publishers operate with low profit margins, imposition of inevitably staggering tax-collection costs would drive many such companies out of business and significantly reduce access to these vital educational resources. *See Interstate Sales Tax Collection*

from mail order marketers generally provides desirable incentives for all retailers to provide product and services innovation as well as lower prices, which enhances consumer welfare.[7] However, the significant administrative burdens that would befall mail order companies should the status quo be upset would hamper the workings of the marketplace. Increased expenses to mail order companies would, in turn, cause higher prices and reduced availability of products. The healthy competitive effect that mail order has had on the economy in fostering the optimal mix of goods and services at the lowest prices would be jeopardized by a rejection of *Bellas Hess*.

Despite its advantages for certain consumers, there are certain disadvantages in mail order purchasing vis-a-vis retail stores. For example, mail order consumers must pay shipping and handling charges, which often exceed state and local sales taxes. Also, unlike the instant gratification of retail shopping, mail

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Act of 1987 and the Equity in Interstate Competition Act of 1987: Hearings on H.R. 1242, H.R. 1891, and H.R. 3521 Before the Subcommittee on Monopolies and Commercial Law, 100th Cong., 2d Sess., 215-16 (1988) (statement of the Association of American Publishers) ("the burden of collection will fall hardest upon publishers of educational, professional and scholarly works"); *Interstate Sales Tax Collection Act of 1987: Hearing on H.R. 1242 Before the Subcommittee on Select Revenue Measures*, 100th Cong.,1st Sess., 145 (1987) (statement of the Magazine Publishers Association) (noting substantial benefit of mail-order publishing to consumers outside major metropolitan areas and inevitable loss of readership that would attend a price rise due to the increased administrative costs of companies in collecting sales and use taxes).

[7] *See, e.g.*, R. Bork, *The Antitrust Paradox*, A Policy At War With Itself, Ch. 4 (1978) (describing the competitive model and the benefits to consumer welfare of competition).

order consumers must wait for their products. Since many consumer purchases are impulsive in nature or based on instant needs, mail order consumption cannot satisfy this consumer preference. Mail order consumers also face risks associated with not being able to inspect or try on products for fit prior to purchase, which often results in the increased costs and inconvenience of returning merchandise by mail.

Mail order consumers' concern about a reversal of *Bellas Hess* does not stem from a desire to avoid paying the sales and use taxes.[8] The concern instead is that a reversal of the *Bellas Hess* standard would result in a loss of consumer options, higher prices for products sold both in stores and by mail, and severe burdens on the disabled, the elderly, and the rural residents who depend on this form of consumption.

In fact, consumers would likely prefer some rational and effective method for direct collection of use taxes from them by their own state. States requiring annual income tax returns could collect use taxes with relative ease. In this way, the consumer pays the tax at one time. In going through his or her check registers and credit card monthly statements, which must be done in preparing income tax returns, a person can easily determine the amount of purchases made from out-of-state companies and then calculate the amount of use taxes. This is the system of use tax collection employed in Maine and New Jersey, and it appears to work reasonably well.

Mail order consumers are concerned about the difficult and unfair burdens that would be placed on

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[8] A 1988 Gallup Poll found that 76% of mail order consumers view sales tax as irrelevant when deciding to purchase a product.

them if they were required to calculate the tax at the time of purchase. Before ordering a product, the mail order consumer first would have to determine what state and local tax is applicable. Because the state of destination of the product would be controlling, mail order consumers sending gifts would have to know the tax provisions not only of their own state but also the state of destination. The consumer would have to determine whether the item is tax-exempt. Products may be totally exempt, exempt for particular purchasers, or exempt for particular uses. Exemptions, of course, vary from state to state, so a grandmother in Indiana sending identical gifts to grandchildren in Illinois, California, and Ohio, would have to check exemptions for local and statewide taxes in six different jurisdictions.

Such an exercise could be particularly complicated depending on the product involved. If the gift sent to Illinois, California and Ohio is a fruit and cheese basket, for example, the grandmother might find that among the six jurisdictions the food items may be exempt while the basket is taxable; the entire item may be exempt; the entire item may be taxable; or the taxable or exempt status may depend on the relative value of the food and non-food items.

The difficulties in determining the tax exempt status of products are similar if the mail order consumer is purchasing the product for his or her own use. The tax-exempt status of a pair of shoes and a belt may depend on whether the shoes are "footwear" or "sportwear" and whether the belt is "clothing" or an "accessory".

Once the issue of taxability is settled, the mail order consumer would have to determine applicable tax

rates. Forty-five states plus the District of Columbia charge a sales tax, with rates ranging from 1% to 10%. Of those, many states also have varying county, local or transit district taxes.[9]

The mail order consumer must then consider shipping and handling charges. In some jurisdictions, such charges are entirely exempt from use taxes and in others they are entirely taxable. In some jurisdictions, handling is taxed but shipping is not. Shipping and/or handling may or may not be taxable if the purchaser or the products are exempt.

After the consumer wades through the determination of rates, exemptions, and shipping and handling issues, the calculation of the tax still looms. If different products are part of the same order, some of which are taxable and some not, tax must be evaluated and calculated separately, and totalled.[10]

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[9] In Ohio, for example, total tax rates—statewide and county/transit district—are calculated according to a complex tax bracket schedule system resulting in thirteen different possible overall tax rates. The table, brackets, and instructions that must be consulted in calculating these taxes comprise approximately forty pages of charts, tables, brackets, and regulations. *See* Ohio Tax Reports (CCH) ¶¶ 60-075 - 60-085. Such is obviously much more than a mail order catalog could include.

[10] Again, as shown by the Ohio example, catalogues cannot possibly provide the volumes of information needed for a thorough canvassing of relevant tax laws. But even a more modest, marginally adequate explanation of tax computation imposes enormous costs on mail order companies. *See Interstate Sales Tax Collection Act of 1987 and the Equity in Interstate Competition Act of 1987: Hearings on H.R. 1242, H.R. 1891, and H.R. 3521 Before the Subcommittee on Monopolies and Commercial Law*, 100th Cong., 2d Sess. 206 (1988) (statement of William T. End, Executive Vice President of L.L. Bean, Inc.) (estimating that "using catalogue space to explain the sales tax rates and exemptions of the 46 taxing jurisdictions would have had a direct cost in 1987 of $950,000 and an opportunity cost of $9.5 million of lost sales by reason of devoting valuable catalogue space for this purpose").

The 1991 catalog of a popular chain of stores, The Sharper Image, illustrates the practical difficulties faced by consumers in calculating sales taxes. The order form demonstrates the complexity of computation:

> SALES TAX INFORMATION:
>
> For shipment to the following states, please add sales tax at the appropriate rate (state and, if any, local and transit). Figure tax on merchandise. If shipment is to a state marked "*", apply tax to delivery charges as well. [State abbreviations follow].

Mail order consumers, as represented by the Amici, have a compelling interest in preserving maximum access to mail order products that their personal circumstances render essential, or that otherwise enrich the consumer marketplace. Mail order consumers assert a further interest in avoiding the burdens that self-computed taxation would impose. For these reasons, the Amici urge the Court to strike down the North Dakota court's repudiation of Supreme Court precedent and reaffirm the sound principles embodied in *Bellas Hess*.[11]

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[11] A solution to this problem would be federal legislation mandating some uniform mail order tax requirements. But this point only underscores the wisdom of the Court's previously unquestioned precedent, which left regulation of interstate mail order commerce to the branch of government specifically granted such regulatory authority by the Constitution. The Congress is best

SUMMARY OF ARGUMENT

A state's imposition of tax collection and remittance obligations on mail order firms with no presence in that state unjustifiably burdens interstate commerce. The unwarranted harm inflicted upon mail order firms by burdensome regulations would ultimately afflict consumers in the form of higher prices and more limited access to goods. The commerce clause abhors such effects. Any legitimate state purpose could be accommodated by less disruptive means.

No constitutionally significant changes in the nature of the mail order market have occurred since *Bellas Hess* was decided. Only the size of the mail order market and the complexity of complying with the regulations of multiple jurisdictions have increased. Given the absence of significant market change, the Court should reverse the court below, reaffirm *Bellas Hess*, and preserve the fair and diverse interstate market that has flourished under the constitutional protections of the Court's precedent.

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equipped to deal with the practical complexities and numerous policy alternatives regarding mail order taxation. The Congress has often considered, and so far rejected, legislative reconsideration of the status quo. *See* S. 282, 93rd Cong., lst Sess. (1973); S. 2092, 93rd Cong., lst Sess. (1973); S. 2811, 93rd Cong., lst Sess. (1973); S. 2173, 95th Cong., lst Sess. (1977); S. 983, 96th Cong., lst Sess. (1979); S. 1510, 99th Cong., lst Sess. (1985); H.R. 3549, 99th Cong., lst Sess. (1985); S. 639, 100th Cong., lst Sess. (1987); S. 1099, 100th Cong., lst Sess. (1987); H.R. 1242, 100th Cong., lst Sess. (1987); H.R. 3521, 100th Cong., lst Sess. (1987); H.R. 1891, 100th Cong., 2d Sess. (1987); S. 2368, 100th Cong., 2d Sess. (1988); S. 480, 101st Cong., lst Sess. (1989); and H.R. 2230, 101st Cong., lst Sess. (1989).

ARGUMENT

NORTH DAKOTA CONTRAVENES THE COMMERCE CLAUSE BY IMPOSING DISPROPORTIONATE TAX COLLECTION OBLIGATIONS ON OUT-OF-STATE MAIL ORDER COMPANIES, WHICH RECEIVE NO BENEFIT FROM THE STATE; AS A RESULT THE OPEN MARKET UPON WHICH CONSUMERS RELY IS IMPERILED.

"It has long been accepted that the commerce clause not only grants Congress the authority to regulate commerce among the States, but also directly limits the power of the States to discriminate against interstate commerce." *New Energy Co. v. Limbach*, 486 U.S. 269, 273 (1988) (*citing Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979), *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 534-535 (1949), *Welton v. Missouri*, 91 U.S. 275 (1876)). This negative implication of the commerce clause prohibits state laws "designed to benefit in-state interests by burdening out-of-state competitors." *Id.* Moreover, the Court has rejected commerce clause analysis that focuses merely on "the character of the privilege" of engaging in interstate commerce, rather than on the "practical consequence[s]" of the state laws on interstate commerce. *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266, 294-295 (1987) (*citing Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279-281 (1977)). "State taxation . . . falling on interstate commerce . . . can only be justified as designed to, make such commerce bear a fair share of the cost of the local, government whose protection it enjoys." *Bellas Hess*, 386 U.S. at 756 (*quoting Freeman v. Hewit*, 329 U.S. 249, 253 (1946)).

The commerce clause embodies an interest in open markets and the operation of market forces. *See, e.g.*,

Boston Stock Exchange v. State Tax Comm'n, 429 U.S. 318, 335 (1977) (noting "free trade purpose" of commerce clause); *Transcontinental Pipe Line Corp. v. State Oil & Gas Bd.*, 474 U.S. 409, 435 (1986) (Rehnquist, J., dissenting) (acknowledging "implicit 'free market' purpose" of the commerce clause); *American Trucking Ass'ns*, 483 U.S. at 281 (commerce clause acts in part as a "guarantee of a free trade area among States"); *see also* Federalist 11 (Hamilton) (commerce clause and free interstate commerce will make available a variety of goods from the several states).

North Dakota's attempt to impose tax collection and remittance requirements on out-of-state mail order companies with no presence in the State violates these sound principles of commerce clause jurisprudence. It works a substantial hardship on consumers, the ultimate beneficiaries of our open markets. *See* Statement of Interests, *supra*.

Overturning *Bellas Hess* would greatly burden out-of-state companies because they would incur disproportionate and substantial administrative costs. Unlike local retailers who can collect taxes at the point of sale with relative ease and assurance, the out-of-state retailers would rely in large part on customer calculation and payment. Consumers will often fail to remit the proper amount of tax, or fail to remit tax at all. Out-of-state companies must then expend resources either tracking down the customer to collect the tax deficiency, or, more likely, simply pay the customer's tax themselves. Although the tax rates are the same for in-state and out-of-state companies, the differing burdens on their respective customers and

the differing burdens of compliance demonstrate the excessive hardship placed on the out-of-state firms.

The *Bellas Hess* Court expressed alarm that with over 2,300 states and localities capable of imposing use taxes, the "many variations in rates of tax, in allowable exemptions, and in administrative and recordkeeping requirements could entangle National's interstate business in a virtual welter of complicated obligations to local jurisdictions with no legitimate claim to impose 'a fair share of the cost of the local government'." 386 U.S. at 759-760 (citations omitted). The burdens to out-of-state mail order companies of tax collection have increased threefold since *Bellas Hess*. There are now over 6,139 sales and use tax jurisdictions. Further, although in 1967 there were seven different tax rates that ranged from two to five percent, there are now ninety different state-wide tax rates ranging from one to ten percent, and hundreds of additional local rates.[12] The "entangle-

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[12] Computers will not alleviate these burdens. Computers cannot assist out-of-state mail order companies in dealing with audits, for example. The large number of tax jurisdictions expose the out-of-state firms to a bewildering array of audits from different jurisdictions. Further, computers cannot solve the problems associated with tax collection. The "post-sale collection costs" that the out-of-state firms will face is enormous, as many consumers will fail to comply accurately with complex tax computation and payment requirements. These collection costs will often be greater than the collectable tax and, thus the companies will simply pay it themselves. Finally, no available computer programs can determine the exempt products and unique circumstances leading to exemptions throughout the number of tax jurisdictions. *See generally Collection of State Sales and Use Taxes by Out-of-State Vendors: Hearing on S. 593 and S. 1099 Before the Subcommittee on Taxation and Debt Management*,

ments" that concerned the Court in 1967 have worsened in 1991. To let the North Dakota court's decision stand would result in a great disservice to consumers.

Because these tax collection and remittance burdens effectively place the products of out-of-state companies at a "substantial commercial disadvantage", they offend the commerce clause. *New Energy Co.*, 486 U.S. at 275, (*citing Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 349-351 (1977) (invalidating under the commerce clause a North Carolina statute that did not exclude apples from other states, but merely imposed additional costs upon Washington sellers and deprived them of their relative commercial advantage.))[13] As in *New Energy* and *Hunt*, out-of-state mail order goods—and the consumers who use them—would suffer distinct burdens vis-a-vis the goods of in-state retailers if this Court overrules *Bellas Hess*.[14]

100th Cong., lst Sess. 52 (1987) (testimony of Alan Glazer); *Interstate Sales Tax Collection Act of 1987: Hearing on H.R. 1242 Before the Subcommittee on Select Revenue Measures*, 100th Cong., lst Sess. 178 (1987) (testimony of Heath Kline).

[13] Out-of-state goods need not be completely banned in order to find a Commerce Clause transgression. *New Energy Co.*, 486 U.S. at 275; *Hunt*, 432 U.S. at 349-351.

[14] The burden on interstate commerce caused by the tax obligations does not affect all mail order firms equally. Currently in-state companies with mail order options and other mail order companies with the requisite nexus have collection and remittance obligations. But as the *Bellas Hess* court acknowledged, companies with a presence in the state have thereby established some *quid pro quo* that justifies the imposition of tax burdens. 386 U.S. at 756. Those companies have received benefits from the state by their physical presence. Moreover, the mail order companies with retail stores in the state can make up some of

Moreover, the imposition of tax collection obligations by a state especially offends the commerce clause when the burdened firm has no presence in the state and the state thus has "no legitimate claim to impose 'a fair share of the cost of the local government'." *Bellas Hess*, 386 U.S. at 760 (citations omitted). The North Dakota Supreme Court concluded, however, that mail order companies receive substantial benefits from a state because they send catalogs to residents of the state, and these benefits outweigh the burdens to mail order companies. The North Dakota court's conclusion, however, is wrong. If there is any benefit conferred by the state governments from catalog disposal, the benefit is provided to the mail order customers, who are the residents of the state and pay state and local costs to support the cost of solid waste disposal. Catalogs are valuable tools to assist consumers in selecting products to purchase. Consumers who purchase products by mail need the catalogs to determine what to purchase. The consumers decide when they wish to discard the catalogs, as is the case for magazines and other periodicals.[15]

In sum, as discussed in the Interests of *Amici Curiae* section, the consumers' interest would be ad-

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the lost sales through their stores as consumer preferences change. The ultimate question of whether the state has impermissibly burdened interstate commerce requires a balancing of interests and equities and an evaluation of the State's justifications. *See, e g., Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970); *Maine v. Taylor*, 477 U.S. 131 (1986). An in-state presence tips the balance in favor of the state.

[15] The consumers pay local taxes that support the cost of trash collection of their household products, including catalogs. There is no logic in allocating the cost of waste collection to different components of a resident's trash.

versely affected if *Bellas Hess* were overruled. Undue and unnecessary restrictions on the free flow of goods in interstate markets would be imposed by burdening mail order companies with use tax collection in jurisdictions throughout the country, all to the detriment of the consumer interest. At the same time, mail order companies do not receive the benefits of a local presence in these markets.

Furthermore, legislative judgments of the type made by the North Dakota court should be left to Congress, which has the best ability to weigh all the interests involved. *See Bendix Autolite Corp. v. Midwesco Enterprises*, 486 U.S. 888, 897 (1987) (Scalia, J., concurring) (recommending abandonment of the *Pike* test and urging deferral to Congress and adherence to *stare decisis*). Certainly, the states can seek redress through federal legislation. As the *Bellas Hess* Court noted, "[u]nder the Constitution, this is a domain where Congress alone has the power of regulation and control." 386 U.S. at 760. The appropriateness of congressional action in this area, as opposed to either state or judicial action, further weakens the justifications for multiple state burdens on interstate commerce. The Court should thus reject North Dakota's attempt to disrupt the status quo, and allow Congress to act, pursuant to its exclusive constitutional mandate, if through its legislative judgment it deems that additional regulation of interstate commerce is appropriate.

CONCLUSION

For these reasons Amici respectfully submit that the judgment below should be reversed.

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No. 91-194

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

QUILL CORPORATION,
Petitioner,
v.
STATE OF NORTH DAKOTA,
by and through its Tax Commissioner,
HEIDI HEITKAMP,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of North Dakota

BRIEF OF CLARENDON FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER QUILL CORPORATION

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On Writ of Certiorari to the Supreme Court of the State of North Dakota

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BRIEF OF CLARENDON FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER QUILL CORPORATION

INTEREST OF AMICUS CURIAE

Pursuant to Rule 36.2 of this Court, the Clarendon Foundation respectfully submits this brief amicus curiae in support of Petitioner, Quill Corporation. Written consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of this Court.

The Clarendon Foundation is a non-profit, non-partisan legal foundation concerned with significant legal issues related to the Constitution, democratic government and the attendant rights and responsibilities of citizenship. The

Foundation participates in various forums in cases where the resolution of constitutional issues may be aided by historical and philosophical analyses. The Clarendon Foundation is committed to an on-going review of the basic tenets of our constitutional government, in the spirit of George Mason's admonition that ". . . no free government, or the blessings of liberty, can be preserved to any people, but . . . by frequent recurrence to fundamental principles." The instant case raises questions of paramount significance to the public interest. We believe the Foundation's perspective will complement Petitioner's brief and assist the Court in the resolution of these issues.

SUMMARY OF ARGUMENT

The proper resolution of this case requires only that the Court stand on the sound rationale of *National Bellas Hess*. *National Bellas Hess* affirmed the exclusive power of Congress "[t]o regulate Commerce . . . among the several States" and restricted a state's authority to levy a use tax collection duty on out-of-state mail order vendors unless the vendors have a physical presence within the state. The *National Bellas Hess* rationale is as sound today as when pronounced in 1967, and has not been diminished in any degree by the recent trend toward reckoning state taxing jurisdiction in terms of the "economic presence" of the out-of-state company. Whatever value the "economic presence" test may have for deciding other jurisdiction-to-tax issues, the application of that test here is indefensible.

The requirement of physical presence has not been rendered obsolete either by modern technology or by changes in Commerce Clause or Due Process Clause formulae in the years since *National Bellas Hess*. To the contrary, physical presence as a concept retains the fundamental logic which has always commended it, namely, that corporations not physically situated within the state as a political subdivision do not enjoy the attendant

political privileges. As Chief Justice Stone wrote for the Court, "To the extent . . . the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exercised when interests within the state are affected." *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 767-68 n.2 (1945). Such disparity of political power is the *raison d'etre* for commending exclusive power over interstate commerce to the Congress. This case provides the Court with the opportunity to affirm this proper limitation on a state's regulatory power over an out-of-state business with no physical presence in the taxing jurisdiction.

ARGUMENT

I. PHYSICAL PRESENCE AS AN ANALYTICAL MODEL FOR ASSESSING STATES' REGULATORY AND TAXING JURISDICTION HAS BEEN FIRMLY ESTABLISHED.

The decision of the North Dakota Supreme Court challenges the continuing vitality of the physical presence test adopted by this Court in *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), and applied in numerous other cases. In *National Bellas Hess*, Illinois sought to impose a use tax on an out-of-state vendor, whose only contacts with the State of Illinois consisted of the periodic mailing of catalogs and advertising flyers to Illinois residents and the delivery of goods to state residents by mail or common carrier. 386 U.S. at 754. The vendor did not maintain an office or have any sales personnel or agents there, nor did it own any property in the state. *Id.* Notwithstanding the vendor's lack of physical presence, Illinois demanded that the vendor collect a use tax from its Illinois customers.

The Court refused to uphold Illinois' assertion of authority, declining "to repudiate totally the sharp distinction" between mail-order firms with physical property in

the regulating state and those lacking in-state property. *National Bellas Hess*, 386 U.S. at 758. According to the Court, the Commerce Clause requires " 'some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.' " *Id.* at 756 (quoting *Miller Bros. Co. v. State of Maryland*, 347 U.S. 340, 344-45 (1954)). The Court concluded that it was "difficult to conceive of commercial transactions more exclusively interstate in character than the mail order transactions here involved." *Id.* at 759.

National Bellas Hess stands as the counterfactual to other cases in which the Court—drawing the same "sharp distinction"—has upheld the power of a state to impose liability upon an out-of-state seller to collect a local use tax where the vendor *does have* a physical presence within the state. A collection duty on a mail-order firm with in-state retail stores was held constitutional in *Nelson v. Montgomery Ward & Co.*, 312 U.S. 373 (1941). Similarly, the Court upheld the imposition of a use tax collection duty in *General Trading Co. v. State Tax Comm'n.*, 332 U.S. 335 (1944), where a mail-order firm employed an in-state traveling sales force. And in *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960), the Court held that a mail-order firm's solicitation of orders through an in-state sales force of ten individuals created the necessary jurisdictional predicate for the state. The Court reaffirmed the principles of *National Bellas Hess* in *National Geographic Soc'y v. California Bd. of Equalization*, 430 U.S. 551 (1977), in which it upheld a state's imposition of a use tax collection duty on a mail-order firm with two offices in the regulating state.

Absent physical presence, a state's exercise of regulatory jurisdiction over an out-of-state entity can be sustained only when the state regulation is designed to protect state residents. Note, *Collecting The Use Tax On Mail Order Sales*, 79 Geo.L.J. 535, 544 (1991). For example, in *Travelers Health Ass'n v. Virginia*, 339 U.S.

643 (1950), this Court upheld state regulation of an out-of-state mail-order insurance company because the "state has a legitimate interest in all insurance policies protecting its residents against risks, an interest which the state can protect even though the 'state action may have repercussions beyond state lines. . . .' " *Id.* at 647, *citing Osborn v. Ozlin*, 310 U.S. 53, 62 (1940). *See also Alden's Inc. v. Packel*, 524 F.2d 38, 44 (3d Cir.), *cert. denied*, 425 U.S. 943 (1976) (rejecting due process challenge to state's usury laws because the state had an interest in protecting residents from an out-of-state company's excessive interest rates). Such cases are not exceptions to Congress' exclusive power over interstate commerce, but rather, must be seen as an exercise of a state's inherent power to protect its own citizens within the state.

By contrast, North Dakota's imposition of a tax collection duty on an out-of-state company selling office supplies serves no such prophylactic purpose and fulfills no such police duty. The tax collection law serves one, and only one, end—the generation of state revenues. It is wholly unrelated to the state's concern for its citizens' welfare and safety.

Physical presence is the "nexus" between the state and the out-of-state vendor that justifies the tax collection duty. The vendor's duty, in turn, is its *quid pro quo*, its "fair share of the cost of local government whose protection it enjoys" and for which the state "can ask return." *National Bellas Hess*, 386 U.S. at 756 (citations omitted). *See also National Geographic Soc'y*, 430 U.S. 551 (1977).

The North Dakota Supreme Court, finding that this Court would today overrule *National Bellas Hess*, rejected the position that Quill Corporation's lack of physical presence in North Dakota was determinative. The state court's position follows the view taken by some courts and academics that the required nexus between the

buyer's state and an out-of-state seller should be economically rather than physically based. *See, e.g., American Refrigerator Transit Co. v. State Tax Comm'n*, 395 P.2d 127 (1964); P. Hartman, FEDERAL LIMITATIONS ON STATE TAX AND LOCAL TAXATION, 39-40, 438-39, 628, 630-32 (1981); McCray, *Overturning Bellas Hess: Due Process Considerations*, 2 B.Y.U.L.Rev. 265 (1985). The rationale for this argument is that an out-of-state vendor whose products are consumed in the market state derives benefits from the market state in addition to those ordinarily predicated upon a firm's physical presence within the state's boundaries. Technological innovations, it is said, have increased an out-of-state vendor's access to the economic benefits of the market state to such a level that the rationale of *National Bellas Hess* is no longer valid. *See North Dakota v. Quill Corp.*, 470 N.W.2d 203, 225 (1991).

This approach is fundamentally flawed. The soundness of the Court's rationale in *National Bellas Hess* is supported by (1) a review of the historical circumstances which necessitated adoption of the Commerce Clause; and (2) an analysis of the physical presence test in the context of the delicate tension between state sovereignty and interstate commerce. As demonstrated herein, a careful look at the nature of state sovereignty shows that the "benefits" analysis is actually ancillary to a much more fundamental rationale for the physical presence requirement.

II. THE JUSTIFICATION FOR THE COMMERCE CLAUSE: THE TENSION BETWEEN STATE SOVEREIGNTY AND FEDERAL JURISDICTION OF INTERSTATE COMMERCE.

The efficacy of the physical presence test is underscored when the circumstances which necessitated the creation of the Commerce Clause are considered. History teaches that the *Articles of Confederation* failed principally because the states were functioning at radical cross-

purposes in areas affecting interstate commerce. In *The Federalist*, for example, Alexander Hamilton warned that "the interfering and unneighborly regulations of some states," if not restrained, could lead to the conditions then paralyzing the German Empire, whose commerce was "in continual trammels from the multiplicity of duties which the . . . states exact upon the merchandisers passing through their territories." THE FEDERALIST No. 22 (A. Hamilton).

James Madison's concerns on this score were equally grave:

> A very material object of this power [to regulate commerce] was the relief of the States which import and export through other States, from the improper contributions levied on them to the latter. Were these at liberty to regulate the trade between State and State, it must be foreseen that ways would be found out to load the articles of import and export, during the passage through their jurisdiction, with duties which would fall on the makers of the latter and the consumers of the former. We may be assured by past experience, that such a practice would be introduced by future contrivances; and both by that and a common knowledge of human affairs, that it would nourish unceasing animosities, and not improbably terminate in serious interruptions of the public tranquility.

THE FEDERALIST No. 42 (J. Madison).

In response to these concerns, the Commerce Clause was fashioned to neutralize the "fruitful source of contention" which conflicting state commercial practices had spawned. THE FEDERALIST No. 7 (A. Hamilton). On this score, there was virtually universal consensus among the participants of the Constitutional Convention. Their contemporaneous writings "stressed the point that every one was in agreement as to the merit of this feature of the Constitution, and they seem to have been stating a fact." Abel, *The Commerce Clause In The Constitutional*

Convention And In Contemporary Comment, 25 Minn. L. Rev. 432, 444 (1941). Accordingly, the Framers established, in remarkably unequivocal language, that "[T]he Congress shall have Power . . . To regulate Commerce . . . among the several States." U.S. CONST. art. I, § 8, cl. 3.

This Court's decisions have affirmed repeatedly that the fundamental purpose of the Commerce Clause is to preserve national political and economic union. *See, e.g., H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 533-35, 537-39 (1949) (the Commerce Clause, and this Court's decisions thereunder, are intended to preserve "the solidarity and prosperity of this Nation" by ensuring that "our economic unit is the Nation"). The Framers intended to prevent a recurrence of the "economic Balkanization that had plagued relations among . . . the States under the Articles of Confederation." *Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979).

This history is significant to modern Commerce Clause analysis, for it makes clear the Framers' understanding that as to matters affecting commerce among the states, Congress should exercise exclusive authority. Such grant of authority suggests, however, that as to matters within the jurisdiction of the state, the states were to maintain their independent power.

The unavoidable tension between the states' desire to promote their distinct and parochial interests, and the national government's interest in maintaining fluid channels of interstate commerce, is a dynamic which is no less at work today than it was when the Commerce Clause was created. This dynamic was succinctly characterized by the U.S. Court of Appeals for the Third Circuit in *Alden's, Inc.*

> No state interest rates so high in the state scale of values as the state sovereign's fisc. At the same time no extraterritorial manifestation of sovereignty, except possibly arrest, is quite so offensive to common notions of its territorial limits.

Id. at 43-44.[1]

The instant case concerns this very tension. The physical presence requirement preserves the equilibrium between Congress' constitutional authority over interstate commerce and the states' inherent authority over matters within their territory. Yet, for reasons amplified in Section III, the decision of the North Dakota Supreme Court threatens this constitutional balance. As this Court observed in *National Bellas Hess*,

> if the power of [the states] to impose use tax burdens on [an out-of-state vendor] were upheld, the resulting impediments upon the free conduct of its interstate business would be neither imaginary nor remote. For if Illinois can impose such burdens, so can every other State, and so, indeed, can every municipality, every school district, and every other political subdivision. . . .

386 U.S. at 759. The Commerce Clause was designed to protect out-of-state entities against precisely this result.

III. THE PHYSICAL PRESENCE TEST OF *NATIONAL BELLAS HESS* IS ANALYTICALLY SOUND.

An analysis of the philosophical foundations of state authority demonstrates plainly that the physical presence criterion applied by the Supreme Court in *National Bellas Hess* is wholly appropriate and, indeed, that its rationale is not correlated in any degree with technologi-

[1] A further point must made in this connection. The federal preemption reflected in the Commerce Clause applies no less to *state courts* than to state legislatures. Neither state organ has the authority to effectuate regulations which extend beyond the reach of the state's regulatory or taxing jurisdictional authority. Yet, the decision of the North Dakota Supreme Court is a plain instance of judicial legislation in an area where only Congress is authorized to regulate.

cal developments. The North Dakota Supreme Court's error lies in its premise that a state's providing protections and benefits to its citizens is the sole precondition for the state's jurisdiction over the recipients of such protections and benefits. This premise is incomplete and thus flawed; the overlooked complement of the benefits criterion actually provides the fundamental justification for the physical presence requirement.

The philosophical underpinnings of the rights and privileges of citizenship in a state are deeply rooted in the great social contract theorists of the Enlightenment. *See* J. Locke, SECOND TREATISE OF CIVIL GOVERNMENT (Bobbs-Merrill 1962) (1st ed. 1690); T. Hobbes, LEVIATHAN (Indianapolis 1958) (1st ed. 1651); J. Rousseau, THE SOCIAL CONTRACT (F.M. Watkins ed. 1954) (1st ed. 1762). *See also* A. Kelly & W. Havbison, THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENTS 94 (3d ed. 1963); J. Kettner, THE DEVELOPMENTS OF AMERICAN CITIZENSHIP: 1608-1870, 44 (1978). According to these theorists, whose influence upon the Framers is undisputed, the moral authority of the state derives from an implicit contract among the members of the state. The power of the sovereign arises from the consent of its citizenry. Indeed, Locke's consent theory served as a cornerstone for various written compacts central to the Nation's political and legal development, including the Mayflower Compact, colonial charters, and the Declaration of Independence.

The justification for state sovereignty relies upon two criteria, not equal in weight. The less important of these—and the focus of the lower court's decision—is the protections and benefits which citizenship in a state affords. Although this criterion is significant, it is not the primary philosophical justification for state regulation. Rather, to legitimize such regulation, the state must rely upon a second criterion, namely, whether the citizens affected by the state's laws have an influence in

the political processes of the sovereign. The overwhelming importance of this latter criterion is highlighted in the case where a state enacts ineffective or improvident laws: the mere fact that a law may not adequately protect or benefit the citizenry does not of itself invalidate the law, provided the procedure of its enactment accords with the principles of representative democracy (*i.e.*, the second criterion is satisfied). Hence, the Court must "view[] with suspicion any state action which imposes special or distinct burdens on out-of-state interests unrepresented in the state's political process." L. Tribe, AMERICAN CONSTITUTIONAL LAW 409-10 (2d ed. 1988).

In Locke's view, one of the most important attributes of representative government is the ability of the constituency "to alter the legislative [power], when they find the legislative act contrary to the trust imposed in them." J. Locke, OF CIVIL GOVERNMENT 192 (Best Printing Co. ed. 1943). Indeed, Locke viewed this ability as a feature of all valid governments:

> And thus the community perpetually retains a supreme power of saving themselves from the attempts and designs of anybody, even of their legislators, whenever they shall be so foolish or wicked as to lay and carry on designs against the liberties and properties of the people.

Id.

The justification for state intervention in the affairs of a corporate citizen is no less than that for natural persons: corporations receive protections and benefits from the state and, by virtue of their physical presence, have an influence in the political processes of the sovereign.

In the case at bar, however, these two criteria utterly diverge. Whatever measure of economic benefit Quill Corporation may receive from the commercial environment maintained by the State of North Dakota, it has no involvement in the processes of the sovereign which correlates in any degree whatsoever with the influence

which local commercial entities possess. Quill Corporation is not incorporated or otherwise physically located within any municipal subdivision, county or state legislative district within North Dakota, nor is it indirectly present through agents or salesmen. Quill Corporation thus lacks those affiliating circumstances in North Dakota that would permit it to reap the benefits of state citizenship and participate in the state's political processes. Quill Corporation's sole contacts in North Dakota are its customers, and that relationship is mediated by the U.S. Postal Service and other traditional common carriers. Neither Quill Corporation's customers nor the communications media can be said in any meaningful sense to represent Quill's political interests in North Dakota.

The fact that Quill Corporation lacks this voice exposes the flaw in the economic presence argument. This can be illustrated by analogy to the philosophical justification for a state's authority over visitors, who are unrepresented in the regulatory state's own political processes.

On its face, it may appear that a benefits criterion serves as the predicate for regulating a visitor's activities. This is incorrect. The justification underlying the authority of a state law enforced against visitors derives from the concept of private property, basic to social contract theory and firmly ingrained in the consciousness of the Framers of the Constitution.

Under social contract theory, one of the original rights arising from the initial contract is the sovereignty of an individual over his or her own property. Similarly, the state, as the collective agent for its residents, establishes territorial boundaries. On this basis, it can impose regulations on visitors to the state not unlike, in the abstract, the demands that an individual can make of those who enter his or her private property.

The range of conditions a state can impose on visitors includes subjecting them to the state's regulatory and

taxing practices. Even though it is true that visitors receive, during their stay, the protections and benefits of the state, this criterion does not provide the essential justification for the state's subjecting visitors to the same laws as citizens. Rather, that justification is that visitors have come within the state's territorial boundaries and must observe the rules and regulations applicable therein. It is this consideration, rather than a benefits criterion, which provides the most coherent basis for delimiting a state's regulatory reach. *See Burnham v. Superior Court of California*, 495 U.S. 604 (1990) (plurality opinion).

The physical presence criterion of *National Bellas Hess* logically flows from this analytical model of state regulatory authority. When a corporation actually establishes a physical presence in a state, in the form of regional offices, a sales force or retail outlets, it is in the same position as a citizen or visitor. It is within the territorial jurisdiction of the state, and may be required to enforce the state's use tax within that jurisdiction.

This, however, is not such a case. Neither Quill Corporation nor its agents has ingressed any property under the jurisdiction of the State of North Dakota. It cannot legitimately be said to have come within North Dakota's regulatory jurisdiction.

In sum, the physical presence doctrine is grounded in the view that the authority of the state derives from the consent of the governed and the principle of private property. The economic presence model invoked below, by comparison, relies upon a benefits criterion which is insufficient, in and of itself, to justify state regulatory jurisdiction outside the state's territorial boundaries. Accordingly, the North Dakota Supreme Court's analysis is invalid.

CONCLUSION

For the foregoing reasons, the judgment of the North Dakota Supreme Court should be reversed.

Respectfully submitted,

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BRIEF OF AMICUS CURIAE COALITION FOR SMALL DIRECT MARKETERS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the North Dakota Supreme Court is obligated to follow the longstanding precedent of *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), in a case that is factually indistinguishable from *Bellas Hess*?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-194

QUILL CORPORATION,

Petitioner,

v.

STATE OF NORTH DAKOTA,
BY AND THROUGH ITS TAX COMMISSIONER,
HEIDI HEITKAMP,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of North Dakota

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BRIEF OF AMICUS CURIAE COALITION FOR SMALL DIRECT MARKETERS IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The Coalition for Small Direct Marketers is an unincorporated association composed principally of small catalogers that market products by direct mail, and of businesses that supply goods and services to catalogers and to other direct marketers. The Coalition was formed for the purpose of demonstrating to this Court the severe, adverse consequences that would befall small direct marketers—and the corresponding burdens on interstate commerce that would occur—if the decision of the North Dakota Supreme Court were to be affirmed. The Coalition has 142 members. They are identified in Appendix A to this brief.

The median gross revenue for the last full fiscal or calendar year of the Coalition member companies was $8.5 million.[1] The median number of full-time employees for the same period for these companies was 50. Virtually all of the direct marketers in the Coalition send catalogs, advertising materials, or products by mail or common carrier into all 50 states, including rural and remote areas that otherwise would not be provided such a cornucopia of choices.

The Coalition member companies market a wide variety of products. A partial list of those products includes the following:

printing
computer supplies
automotive carpets
truck accessories
books
sporting goods
audio broadcast equipment
computer software
specialty light bulbs
wedding invitations and greeting cards
baby products
religious materials
video equipment
bedding and home furnishings
computer hardware
athletic lettering
dental prosthetics
gourmet foods
electronic components
orthotic/prosthetic supplies and parts
calculators
metalworking machinery and equipment
flowers
picture frames
wholesale plumbing fixtures and faucets
aquarium supplies
aviation software and pilot supplies
public safety and industrial safety equipment
automotive engine rebuilding supplies
beef
hunting and outdoor clothing and equipment
industrial abrasives
women's clothing
toys and educational materials
yacht racing equipment
consumer electronics
live plants
wholesale and retail aircraft and aircraft parts
medical supplies
jewelry
musical instruments
doll house miniatures
color image scanners
marine electronics
medical books
specialty papers
dental supplies
radio frequency and microwave electronic components

[1] All statistics reported are for those Coalition members that provided information relevant to a particular issue.

fruit
industrial equipment and supplies
portable displays
military apparel
alternative energy and energy conservation products
watches
children's clothing
tools and test equipment
self-education audios and videos
office supplies
baked goods such as cakes, pies, cookies and doughnuts
scientific instruments
swimwear
gardening products
awards
equine products
woodworking tools and supplies
silk underwear and outerwear

The interest of these Coalition members in this case, and that of the thousands of other small direct marketers who are similarly situated, is straightforward: If the decision of the Supreme Court of North Dakota were affirmed, heavy burdens resulting from calculating, collecting and paying use taxes for thousands of jurisdictions would be imposed on them.

Affirmance would cause such serious effects that suppliers of goods and services to the direct marketing industry very likely also would be harmed. In addition, the increased barriers to entry that such a decision would erect would in all probability permanently cripple the direct marketing industry by substantially reducing, or even eliminating, new entrants to the marketplace.

STATEMENT OF THE CASE

Amicus adopts the statement of the case by petitioner.

SUMMARY OF ARGUMENT

In *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), this Court held unconstitutional an attempt by a state to impose on an out-of-state mail order vendor the obligation to collect and pay use taxes when the only contacts with the state were by mail and common carrier. The Court based its decision in large part on the impediment to interstate commerce that would result from imposing a welter of complicated use

tax obligations, originating from multiple jurisdictions, upon mail order businesses.

The North Dakota Supreme Court in the instant case has attempted to unrealistically minimize the *Bellas Hess* Court's significant concerns about burdens on interstate commerce. The North Dakota court does so to justify the imposition of a duty on an out-of-state direct marketer to collect and pay use tax to its state under circumstances legally indistinguishable from *Bellas Hess*. None of the reasons cited by the North Dakota court justify its characterizations of these burdens as something less than undue.

The burdens that would result from use taxation by thousands of jurisdictions remain valid concerns. Administrative burdens would result from differing rates and exemptions, from differences in reporting times, frequency, and formats, and from continual changes in use tax laws. Direct financial harm to direct marketers would be caused by the need to hire additional personnel, by loss of orders, and by underpayment of use taxes by consumers. Severe enforcement burdens and legal uncertainty also would result from affirmance of the decision of the North Dakota Supreme Court. These burdens realistically cannot be lifted by computer technology, as speculated by the state court. Nor does the state's 01.5 percent deduction from the use tax for vendor administration significantly ameliorate these burdens, as the North Dakota court claims.

These burdens fall with special severity upon small direct marketers such as the members of the Coalition for Small Direct Marketers. Even the proponents of legislation in Congress to allow use taxes to be imposed on direct mail firms recognize that the burdens would be too severe for smaller firms.

ARGUMENT

I. THE DECISION OF THE NORTH DAKOTA SUPREME COURT IMPROPERLY DISREGARDS THE BURDENS ON INTERSTATE COMMERCE RECOGNIZED IN *BELLAS HESS*.

A. *Bellas Hess* Accurately Recognizes the Impermissible Burdens on Interstate Commerce That Would Result From Allowing Thousands of Jurisdictions to Impose Use Taxes on Out-of-State Direct Marketers.

In *Bellas Hess*, this Court was presented with an attempt by the State of Illinois to impose the obligation of collecting and paying use tax upon an out-of-state vendor that mailed catalogs and advertising flyers into the state, received orders for goods by mail, and sent its goods to customers in Illinois by mail or by common carrier. In rejecting such an attempt, the Court observed that:

> In order to uphold the power of Illinois to impose use tax burdens on National in this case, we would have to repudiate totally the sharp distinction which . . . [the Court's decisions] have drawn between mail order sellers with retail outlets, solicitors, or property within a State, and those who do more than communicate with customers in the State by mail or common carrier as part of a general interstate business. But this basic distinction, which until now has been generally recognized by the state taxing authorities, is a valid one, and we decline to obliterate it.

Bellas Hess, 386 U.S. at 758 (footnote omitted).

This Court relied in great part upon the burdens that such taxation would impose upon interstate commerce:

> [I]t is difficult to conceive of commercial transactions more exclusively interstate in character than the mail order transactions here involved. And if the power of Illinois to impose use tax burdens upon Na-

> tional were upheld, the resulting impediments upon the free conduct of its interstate business would be neither imaginary nor remote. For if Illinois can impose such burdens, so can every other State, and so, indeed, can every municipality, every school district, and every other political subdivision throughout the Nation with power to impose sales and use taxes. The many variations in rates of tax, in allowable exemptions, and in administrative and recordkeeping requirements could entangle National's interstate business in a virtual welter of complicated obligations to local jurisdictions with no legitimate claim to impose "a fair share of the cost of local government."

Bellas Hess, 386 U.S. at 759-60 (footnotes omitted).

In support of its decision, this Court quoted with approval language from a House of Representatives Report that noted the "intolerable" burden that imposition of such an obligation would create for smaller companies:

> Given the broad spread of sales of even small and moderate sized companies, it is clear that if just the localities which now impose the tax were to realize anything like their potential of out-of-State registrants the recordkeeping task of multistate sellers would be clearly intolerable.

Bellas Hess, 386 U.S. at 759 n.14 (quoting *Report of the Special Subcommittee on State Taxation of Interstate Commerce of the House Committee on the Judiciary, H.R. Rep. No. 565*, 89th Cong., 1st Sess., 882 (1965)).

In conclusion, this Court observed that—

> The very purpose of the Commerce Clause was to ensure a national economy free from such unjustifiable local entanglements. Under the Constitution, this is a domain where Congress alone has the power of regulation and control.

Bellas Hess, 386 U.S. at 760.

B. The Decision of the North Dakota Supreme Court Does Not Overcome the Concerns of Congress and This Court in *Bellas Hess* Regarding Burdens on Commerce.

The concerns of Congress and this Court regarding burdens on interstate commerce and on the businesses engaged in such commerce remain valid. Congress repeatedly, and recently, has refused to enact any statute permitting states or local jurisdictions to impose the burden of collecting and paying use taxes on out-of-state direct marketers under circumstances similar to those presented by *Bellas Hess*.[2] As to proposals to further regulate interstate commerce, the Coalition respectfully suggests that this Court, and especially state courts, should not rush in where Congress fears to tread.

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[2] *See generally State Taxation of Interstate Commerce: Hearing on S. 1510 Before the Subcomm. on Taxation and Debt Management of the Senate Comm. on Finance*, 99th Cong., 1st Sess. (1985) [hereinafter "1985 Hearings"]; *see also Interstate Sales Tax Collection Act of 1987 and the Equity in Interstate Competition Act of 1987: Hearings on H.R. 1242, H.R. 1891, and H.R. 3521 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 100th Cong., 2d Sess. (1988) [hereinafter "1988 Hearings"].

Governmental representatives of the State of North Dakota have for some years taken a leading role in efforts to have Congress enact such a statute. In 1985, for example, Senator Mark Andrews of that state introduced a bill in Congress (S. 1510) to permit states to require out-of-state direct marketers with no physical presence in the state to collect and pay use taxes. See 1985 Hearings at 7. The North Dakota House of Representatives passed a resolution in 1987 calling upon Congress to enact legislation allowing states to impose such a use tax obligation on direct marketers. Appendix to the Petition for Writ of Certiorari [hereinafter "App."] at A58-A59. In 1987, a bill with that purpose (H.R. 1242) was introduced in the House of Representatives by Representative Byron Dorgan of North Dakota. See 1988 Hearings at 1 and 31-32. Governor Sinner of North Dakota testified before the House Judiciary Committee's Subcommittee on Monopolies and Commercial Law in support of Representative Dorgan's bill. 1988 Hearings at 27-36.

North Dakota apparently gave up on Congress and acted unilaterally. In 1987, the North Dakota legislature amended that state's Use Tax Act, N.D. Cent. Code § 57-40.2 (Supp. 1991), to impose an obligation to collect and pay use tax under circumstances legally indistinguishable from those in *Bellas Hess*. The North Dakota Tax Commissioner undertook to enforce the amended statute by bringing a lawsuit against petitioner Quill Corporation, and the Supreme Court of North Dakota upheld the statute. App. at A1-A36.

That state court's decision was premised upon its own assessment of societal change in this country to which that court believed national constitutional jurisprudence must be tailored. According to the North Dakota court, the "economic, social, and commercial landscape upon which *Bellas Hess* was premised no longer exists, save perhaps in the fertile imaginations of attorneys representing mail order interests." App. at A11. Indeed, the North Dakota Supreme Court believed that, to adhere to the rule of *Bellas Hess*, this Court would have to "abandon its common sense and experience at the courthouse door and ignore the tremendous social, economic, commercial, and legal innovations since 1967, and blindly apply an obsolescent precedent." App. at A10.

The state court divined three principal theories for disagreeing with the *Bellas Hess* Court's expressed concerns about the burdens that would be imposed on direct mailers by having to compute, collect, record, report, and pay use taxes to hundreds or even thousands of jurisdictions. First, the state court opined that those concerns have been "seriously eroded" by the technological advances that have taken place over the space of "the past quarter-century." App. at A26. Now, that court decided, "computer technology" and "automated" systems could be used to alleviate such burdens. App. at A26. Second, this Court has, of late, "all but ignored the burdensome nature of imposition of the collection duty," according to

the North Dakota court. App. at A26. Third, the state court noted that, under the North Dakota statute, the seller is allowed to deduct a percentage (01.5 percent) of the use tax due, which further "alleviates any burdens" created by requiring the out-of-state seller to collect and pay these taxes. App. at A26; N.D. Cent. Code § 57-40.2-07.1 (Supp. 1991). The Coalition respectfully submits, and argues below, that these three theories are without merit.

II. THE HARMFUL EFFECTS OF OVERTURNING *BELLAS HESS* WOULD BE ESPECIALLY SEVERE FOR SMALL DIRECT MARKETERS.

Amicus respectfully disputes the conclusion by the North Dakota court that the burdens on direct mailers no longer support the result reached in *Bellas Hess*. Those burdens—which would be unfair and heavy for all direct marketers—apparently would prove to be fatal for many small businesses.

In *Bellas Hess*, this Court noted that sales taxes, and in most instances use taxes, were imposed by over 2,300 localities. *Bellas Hess*, 386 U.S. at 759 n.12 (citing data for the year 1965). The number of jurisdictions imposing use taxes today has nearly tripled, with most sources estimating the number between 6,500 and 7,000 jurisdictions.[3] The compliance burden on mail order companies has dramatically increased, not decreased, since *Bellas Hess*. National Bellas Hess was a relatively large company for the times, with net sales in 1961 of approximately $60 million, and with "a large number of retail

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[3] *See, e.g.*, Note, *Collecting the Use Tax on Mail Order Sales*, 79 Geo. L.J. 535, 539 n.27 (1991) (citing Advisory Commission on Intergovernmental Relations, *State and Local Taxation of Out-of-State Mail Order Sales* at 6 (1986) ("approximately 6,500 state and local jurisdictions" with use tax)); Westphal, *The Computer's Role in Simplifying Compliance with State and Local Taxation*, 39 Vand. L. Rev. 1097, 1098 (1986) (stating that there were then 46 states, 1,192 counties, 5,100 cities, and 593 rapid transit locations imposing sales/use taxes, for a total of 6,931 jurisdictions).

stores in various States." *Bellas Hess*, 386 U.S. at 760-61 (Fortas, J., dissenting). Allowing for inflation since 1961, it was larger than any of the companies in the Coalition.[4] Because National Bellas Hess operated retail stores in a number of states, it presumably was obligated to collect sales and use taxes in those states.[5] Yet, this Court accurately recognized that, even for such a large company, the *additional* burden of requiring National Bellas Hess to collect use taxes for thousands of jurisdictions with which it had dealings only by mail order would be unbearable.

How does one even begin to describe, then, the magnitude of the burden on the heart of the direct mail industry, the small companies whose employees are measured in dozens or fewer? A telling indication of the serious nature of these multijurisdictional burdens for small companies is that even the *proponents* of imposing use taxes on out-of-state direct marketers concede that exceptions would have to be made for small businesses such as members of the Coalition. For example, in Congressional hearings on proposed legislation in 1985, James L. Martin, Legislative Counsel to the National Governors' Association, testified as follows:

> The governors also understand that sales tax collection efforts may be overly burdensome to small mail order sales businesses. Common sense dictates that they be exempt from compliance.

1985 Hearings at 78.[6] The National Conference of State Legislatures also realized "the need for some protection

[4] Only 10 Coalition members report gross revenue in excess of $60 million in 1991 dollars. Approximately two-thirds of the members have gross revenues of $15 million or less. Four members have gross revenues of less than $500,000 per year; 14 of them report having five or fewer full-time employees.

[5] *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359 (1941); *Nelson v. Montgomery Ward & Co.*, 312 U.S. 373 (1941).

[6] Similarly, in 1988 the National Governors' Association supported proposed legislation that, in its words, would apply to "only large firms with national or single state sales of tangible personal property in excess of reasonable de minimis levels nationally and in each state." 1988 Hearings at 35.

for very small businesses." 1985 Hearings at 68 (Testimony of Hon. David Nething, Majority Leader, North Dakota Senate, on behalf of the National Conference of State Legislatures ("NCSL")).[7] The Advisory Commission on Intergovernmental Relations ("ACIR") stated that "[c]ompliance costs appear to be a particularly serious problem for the numerous small firms, who do not make the bulk of the sales in mail order and direct marketing. The definition of 'small' is a critical component of any proposed legislation." 1985 Hearings at 32 (reproducing ACIR, *State and Local Taxation of Interstate Mail Order Sales (Preliminary Draft)*, at 22). ACIR advised that "[n]o action on taxation of interstate mail order sales should be undertaken without addressing the issue of compliance costs for small firms." 1985 Hearings at 33.[8]

This Court's existing use tax decisions endeavor to ensure, at least in an approximate way, that the burdens of collecting and paying use taxes will be imposed only upon firms of a size sufficient to have a reasonable prospect of surviving those heavy burdens. Under those decisions, only firms that are large enough to establish retail outlets, offices, sales forces, or some other form of "physical presence" in multiple jurisdictions will incur

[7] Significantly, Mr. Nething testified that NCSL did not decide on a specific dollar threshold for a de minimis exception, because of their "expectation that Congress in its review would be better able to judge the make-up of the industry and determine the extent of protections needed." 1985 Hearings at 68.

[8] ACIR further noted that "empirical evidence suggests that compliance costs are particularly a concern for small firms. . . . If a de minimis rule is adopted, the choice of an appropriate threshold would have to be based on carefully weighing the revenue and competitive considerations against the compliance costs." 1985 Hearings at 39-40.

the burden of collecting use taxes in those states. *National Geographic Society v. California Board of Equalization*, 430 U.S. 551 (1977); *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960); *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359 (1941); *Nelson v. Montgomery Ward & Co.*, 312 U.S. 373 (1941). In virtually every instance, those firms also will be collecting sales taxes in those states, and thus will have the personnel, facilities, familiarity with local laws and practices, and financial "staying power" to shoulder this burden without disastrous effects.

Under prevailing law, therefore, out-of-state firms that question their ability to handle the burdens of collecting use taxes can achieve a measure of predictability, and can gradually absorb these burdens as the business grows in size, by introducing a "physical presence" into additional states selectively and incrementally. They do not have to try to absorb the shock of instantaneously being subjected to these burdens from thousands of jurisdictions, as would occur if the North Dakota Supreme Court's decision were to be affirmed.

III. AFFIRMANCE OF THE DECISION BELOW WOULD IMPOSE HARSH COMPLIANCE BURDENS ON SMALL DIRECT MARKETERS, INCLUDING ADMINISTRATIVE BURDENS, FINANCIAL BURDENS, AND ENFORCEMENT BURDENS.

A. Numerous, Inconsistent State and Local Use Tax Laws Would Entangle Small Direct Marketers in a Web of Bureaucratic Regulations.

We respectfully suggest that the North Dakota Supreme Court failed to consider the practical problems of dealing with the multitude of confusing rates and exemptions established by the 6,000 to 7,000 taxing jurisdictions. For every individual order, the vendor would have to identify the state and all local taxing jurisdictions in which the customer resides, to determine how much tax to add and to which jurisdictions the tax on that item

would have to be remitted. States could be identified in most instances, but the location of an address within a local taxing district often would be problematic.

Then, for every particular item ordered, the vendor would have to identify the rate(s) of tax to be applied. These rates are not always uniform, even within a single state. North Dakota, for example, has different "bracket collection schedules" for use tax rates of 04, 04.5, 05, 06, 06.5, and 07.5 percent. All States Tax Guide (P-H) ¶ 1340 (June 11, 1991) [hereinafter "Tax Guide"]. Most, but not all, non-exempt direct marketing sales in North Dakota would be taxed at a five percent state rate. Tax Guide at ¶ 1340. However, local jurisdictions in North Dakota may in some circumstances add local taxes. For example, there is a local sales tax of one percent in Devil's Lake, Grand Forks, and Minot, and a one percent local sales-use tax in Bismark and (effective July 1, 1991) in Jamestown, plus a local sales-use tax of one-half percent in Fargo. Tax Guide at ¶ 1460 (June 11, 1991).

Rates also vary depending upon the nature of the product. Tax Guide at ¶ 1340. Thus, in North Dakota, as in other states, if a customer purchases multiple items in a single order, some items may be taxed at different rates than others. The mail order vendor would then have to determine if some or all of the items purchased are exempt from use tax. To convey a hint as to the incredible complexity of this process nationwide, a list of over 120 such exemptions enacted at the state level for North Dakota, *alone*, is set forth in Appendix B. Of course, each state will have its own list of exemptions.

Statutes also vary considerably on many items that commonly are sold by direct marketers, including such products as food and beverages, drugs, medical devices and supplies, prosthetics, machinery and equipment, computer software, coins, tobacco products, publications,

clothing, and numerous other items.[9] See generally Tax Guide at ¶¶ 5275 *et seq.* (March 21, 1989). Exemptions also may depend on the type of purchaser, or the use to which the product is going to be put, rather than on the nature of the product itself. Exemptions for educational institutions or uses, or for certain types of non-profit entities, for example, are common. Real-world examples make clear that compliance even with unitary systems is extraordinarily difficult for small businesses already.[10]

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[9] Much direct marketing activity is of a "business-to-business" nature, and does not involve sales to individual consumers of consumer products. Thus, exemptions in many states for goods that are used as an ingredient or component part of some other product, for goods used in manufacturing or processing, for equipment or parts, or for containers or packaging materials, may also come into play.

[10] For example, in Congressional hearings in 1988, Bob Edmund, the president of a small mail order catalog company that distributed scientific equipment, painted a striking portrait of the difficulties involved in administering these types of exemptions in just one state:

> Of our $13 million in sales last year, roughly $9 million went to schools and industry. This is where we think the complications and the burden would be greatest for us.
>
> Because in New Jersey, for every educational institution that buys from us, we must determine first whether they are exempt or they are not. . . .
>
> For those who are exempt, we must maintain a tax number on our computer, plus we must have a hard copy of their exemption certificate on file.
>
> This represents many file cabinets for the State of New Jersey. If we had to do this for all the States, I think we would have to put on a little bit bigger room on to our building to do it.
>
> Next problem that comes is that the telephone is a way of doing business. So when Paterson High School calls me up and says, we need $20 worth of microscope slides and we have to have them right away; would you ship those out to us? We go ahead and do that based on the purchase order number, and we will take the exemption number over the phone.

[Continued]

The frequency of reporting to taxing officials and the dates on which those reports must be filed also vary widely. Some states require monthly returns; some require quarterly returns; some require monthly payments

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[10] [Continued]

> Now, that gets shipped out. They get billed. We have to follow up and make sure they send us a hard copy exemption certificate. And they don't always bother to do that. Sometimes you write 3 and 4 letters to them before you have it.
>
> If we don't bother to do that, when we get audited by the State, the first thing they ask for when they come in is, let's see your file of exemption certificates, and they match it to orders, and if we don't have them, we get penalized.
>
> Industrially, the problem is equally complex. Let's say RCA and Princeton buy products from us. They give us an exemption number. We put that on file. We have to, again, have a hard copy of their exemption certificate on file.
>
> Today they sent us an order and they asked for 200 lenses, and a $3,000 research microscope. And we have the exemption number. Now, the question that arises here on the 200 lenses, it certainly is conceivable they are going to build them into a product and sell them to somebody else so they are exempt.
>
> On the $3,000 research microscope it is a big question. If they are going to use it for research, it is exempt. If they are going to use it in the quality control department, it is not exempt.
>
> And the burden is technically upon us to determine what is the case.
>
> Now, it is frankly impossible for us to do that. So if the order comes in, and they have an exemption certificate, and an exemption number on it, we have just got to presume that the whole thing is exempt and do it. . . .
>
> But when we get audited, this is another area where we get our hands slapped. Because the auditor comes in and says, you sold them that research microscope. You should have guessed that it wasn't exempt. You are at fault.
>
> And they go on from there.
>
> On the consumer side, it is much simpler for us. In the State, just about everything we sell is taxable, and the few items that are not are so few that I guess we simply came to the policy that we would tax all consumers on everything they

[Continued]

with an annual return. Tax Guide at ¶ 250 (July 2, 1991). The quarters also vary. For example, New York's quarterly returns must be filed in March, June, September, and December, but Iowa's quarterly returns must be filed in January, April, July, and October. Tax Guide at ¶ 250. The dates for filing both monthly and quarterly returns vary among the states, with some being due on the 15th of the month, others due on the 20th, or the 25th, or the last day of the month. Tax Guide at ¶ 250. There is a variety of exceptions to these rules. For example, in Wisconsin the reporting period generally is quarterly, but it is monthly if the quarterly tax is over $600. Tax Guide at ¶ 250 n.25. Often, the exceptions read like a parody on taxing bureaucracy run amok. In North Dakota, itself, for example, payment generally must be made quarterly, but it must be made monthly, on the last day of the next succeeding month, if total sales exceed $330,000, "except for taxes collected during May of each odd-numbered year, which are payable on or before the twenty-second day of June of that year." N.D. Cent. Code § 57-40.2-07(4) and (7). In short, each state has its own reporting periods and due dates, which are not coordinated with each other. When local jurisdictions are added, the situation moves from impossibly complex to ludicrous.

Nor is there any standardized reporting format. This problem was recognized even by proponents of legislation to permit states to impose use tax requirements on direct marketers under these circumstances. James L. Martin,

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[10] [Continued]

buy from us in New Jersey. The few little items that aren't just are not significant.

But the problem would be if we go out into other States where the exemptions would cover a broader category of our products, that this would not be possible for us today.

So we would have to take our 7,000 products and start to categorize them into what is exempt and what is not. Now, that is no easy task to do.

1988 Hearings at 80-81.

Legislative Counsel for the National Governors' Association, when addressing the administrative issues that would arise if these taxes could be imposed, noted that "[s]ales taxes are levied in 46 States and each one has its own rules and regulations regarding how the tax is to be collected. The Governors would support any reasonable proposal to impose uniform reporting and remittance regulations." 1985 Hearings at 72.

These problems are compounded by the multitudinous changes that occur in use tax requirements every year. As of 1986, the number of yearly changes in sales and use tax laws for state and local jurisdictions was about 400 to 500 per year. Westphal, *The Computer's Role in Simplifying Compliance with State and Local Taxation*, 39 Vand. L. Rev. 1097, 1098 (1986).

A local retailer operating in only one jurisdiction may be able to stay abreast of the state and local sales tax requirements that are applicable to his products, including the constant changes in those requirements. For a small direct marketer, mailing to all 50 states, the task would be well-nigh unthinkable.

B. Permitting Multiple Jurisdictions to Impose Use Tax Obligations Would Cause Direct, Serious Financial Harm to Direct Marketers and Would Discriminate Against Interstate Commerce.

The most obvious and direct financial burden on direct marketers would be the increased personnel costs that would be incurred to cope with the tax laws of thousands of jurisdictions. The amounts will vary from company to company, but these burdens will fall with disproportionate weight on small direct marketers, since even the smallest direct mail firms probably will have to comply with the regulations of all taxing states, and many local jurisdictions. Mr. Edmund, the president of the scientific equipment supply company whose testimony was referenced in note 10, above, provided an indication of the magnitude of the likely personnel costs:

> . . . I hear proponents of the bill say that this is just a simple matter. You just put it in your computer, you buy the program and it is going to do all the work for you, I think they are forgetting about the paperwork that goes behind this.
>
> The computer doesn't call up and collect these exemption certificates. The computer doesn't make the decisions about who is exempt and who isn't exempt. These things have to be done by human beings.
>
> Presently on our staff we have approximately 130 people. One person's job is strictly to take care of the New Jersey sales tax. So I guess we would be hiring a lot of people if we go into this.

1988 Hearings at 81.

It is also virtually certain that orders would be lost due to the increased complexity of the forms that consumers would have to fill out to order merchandise. In a local retail store, only the tax of that state and locality need be considered, and the tax can be automatically computed for the customer at the time of the sale. But for many types of direct marketing, payment must accompany the order. Thus, as William T. End, an executive of the L.L. Bean Company, testified in Congressional committee hearings:

> [W]e would have to include [in our catalog] a complicated set of instructions setting forth rates and exemptions for the various states. Moreover, special instructions would have to be provided for the situations where the person ordering the goods lives in one state, but he or she is sending the goods to a resident of another state. . . .
>
> The success of direct marketing depends upon making the transaction as simple as possible. Once we make mail order complex and confusing for our customers, we discourage their doing business with us.

1988 Hearings at 206.

Furthermore, the need to devote more of the scarce catalog space to tax tables means less product description, hence fewer choices for the consumer, hence fewer sales for the direct marketer—all at greater cost. Mr. End testified that, for L.L. Bean, using catalog space to explain these rates and exemptions "would have had a direct cost in 1987 of $950 thousand and an opportunity cost of $9.5 million of lost sales by reason of devoting valuable catalog space for this purpose." 1988 Hearings at 206. As an alternative, the direct marketer might ask the consumer to estimate the amount of use tax applicable in his jurisdiction. But often consumers will fail to include the use tax, or will underpay it. One direct marketer testified before Congress as to why his company must often simply absorb the loss, rather than attempting to collect unpaid sales taxes for 70 different taxing districts in New York State:

> We remit the taxes whether we collect them or not and that is exactly what we do. We remit it and we don't collect it. We live with it because it is only one State. To do that process on a 46 taxing district basis, to remit moneys that we cannot collect—practically collect—that is, from an efficiency point of view we cannot collect it—certainly we have the right to refuse the order, but not when it is a $35 order and you have the merchandise sitting in the warehouse. And you would like to turn that piece of merchandise into cash.
>
> You look at the $1.25 or the $0.95 or the $0.55, and you say: We will pay it ourselves. But I would hate to do that for 46 States.

1985 Hearings at 122 (Testimony of Alan Glazer, President, Bedford Fair Industries, Ltd.).

Local retailers can compute sales tax for the jurisdiction or two in which they are located, and are able to ensure that the customer pays it before he or she receives the purchased merchandise. If direct marketers were required to collect use tax, by contrast, they would be forced

to incur heavy personnel expenses to comply with the laws of multiple jurisdictions, lose sales due to the enormous complexity of communicating tax information to consumers, and often pay use taxes that, in practical terms, cannot be collected from customers. In short, interstate commerce will be subjected to burdensome discrimination that is not applied to local commerce if the North Dakota Supreme Court decision is allowed to stand.

C. Small Direct Marketers Would Be Subject to Burdensome Enforcement of Uncertain Laws.

For 25 years *Bellas Hess* has provided a bright-line test that is understandable by the many constantly changing direct marketers and taxing authorities who are affected. It has prevented undue burdens on interstate commerce, and has allowed interstate businesses to choose intelligently when they will establish a "physical presence" within a state and thus subject themselves to its taxing jurisdiction. Overruling that decision would convert the bright-line into a foggy quagmire of countless enforcement efforts and lawsuits to define anew the limits of state power to tax out-of-state mail order vendors.

For example, "regular or systematic solicitation," the North Dakota statutory phrase for invoking the use tax, has been interpreted administratively to mean "three or more separate transmittances of any advertisement or advertisements during a testing period." App. at A56. If this interpretation is constitutional, is there any principled difference between three "transmittances" and two, or between two and one? Is a statute, such as North Dakota's, constitutional when it permits use taxes to be imposed only on the basis of magazine advertisements (no matter how small), or television advertisements, alone, or telephone solicitations, alone, without any direct mailings? As money-starved states and localities continue their efforts to increase tax revenues, statutes and administrative interpretations permitting use taxation based on "contacts" of this evanescent sort will continue to extend

their reach, and the disputes thereby engendered will be resolved only after decades of litigation.

Small direct marketers cannot afford to contest enforcement efforts by distant jurisdictions that ordinarily will involve—by litigation standards—relatively small sums of money. They will be presented with a stark choice: Pay up, or stop doing business in the state. Unlike local retailers, they will be subject to audit by multiple jurisdictions. In every taxing state, tax enforcement officers are armed with financial and/or criminal penalties to coerce compliance.[11] Faced with the demands of multiple jurisdictions, the pressure on small direct marketers to comply with even the most unreasonable or unjust exactions will be overwhelming.

IV. THE NORTH DAKOTA SUPREME COURT RELIES UPON ILLUSORY SUPPOSITIONS IN SURMISING THAT THE UNDUE BURDENS ON INTERSTATE COMMERCE RECOGNIZED IN *BELLAS HESS* NO LONGER EXIST.

The North Dakota Supreme Court offered three theories for its position that the burdens recognized in *Bellas Hess* no longer justify the rule established in that case: That the burdens can be substantially alleviated by computers; that the allowance of a 01.5 percent administrative cost deduction further alleviates these burdens, and that this

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[11] With regard to sales and use taxes, the All States Tax Guide states succinctly:

> Penalties are imposed by all tax statutes. The penalties may consist of fines, interest, assessment of additional tax, plus penal penalties. They are imposed for various statutory violations, such as failure to report or pay any tax, not complying with registration, or violations relating to a resale or exemption certificate. Nearly all noncompliance with a tax statute will bring on penalties.

Tax Guide at ¶ 5700 (March 21, 1989). The North Dakota statute provides various penalties, and makes "failing to comply with any of the provisions of this chapter" a Class A misdemeanor. N.D. Cent. Code § 57-40.2-15(4) (Supp. 1991).

Court lately has "all but ignored" the burdensome nature of the collection duty.

A. There Is No Basis for Finding That Computers or Technology Have Greatly Alleviated These Burdens.

The North Dakota Supreme Court—without referring to any pertinent record evidence—theorized that "computer technology" has greatly alleviated the burdens recognized in *Bellas Hess*.[12] That theory is far from established, especially for smaller companies. More important, it is the type of judgment that courts are ill-equipped to make. In response, Amicus notes that the North Dakota court appears to be basing its decision in this regard on uninformed speculation about the state of computer technology and use. And, common knowledge indicates that such speculation is misinformed.

For a computer to perform all or some of the administrative tasks necessary to ameliorate the obvious burdens, there must first be "application software," usually a commercial package, that the computer can run.[13] However, computers come in a variety of types, from mainframes costing millions of dollars, to minicomputers costing tens or hundreds of thousands of dollars, to workstations, to microcomputers ("personal computers"). An

[12] The North Dakota court did cite several factors that it believed established "Quill's extensive computer expertise." App. at A27 n.10. While it may be doubted that these factors truly prove any such "expertise," the more significant point is that the expertise of Quill itself is irrelevant to the important question before this Court. All direct mailers, particularly small ones, do not possess such expertise. Presumably, the constitutional power of states to obligate out-of-state direct marketers to collect and pay use tax does not depend upon an individualized determination of the computer expertise of each such company.

[13] The alternative to purchasing a commercial software application package would be for the company to program the computer itself. For the magnitude of the tasks at issue here, a staff of professional computer programmers would be necessary, probably working in conjunction with accountants and attorneys.

application written to run on one type of computer ordinarily will not run on others without modification or without being wholly rewritten. Within these categories of computers, there are different brands, different operating systems, and different architectures. Some are compatible with each other, and some are not. Thus, the computer market is divided into a number of incompatible niches, and there is no guarantee that application software can or would be marketed to fill all of these niches. Therefore, even if a small direct marketer already had a computer system of sufficient capacity, it may well be that no application software would be marketed *for that company's system* for purposes of computing use taxes for 6,000 to 7,000 jurisdictions.[14] In such a case, the direct marketer would have to buy new computer hardware as well as expensive software, assuming such software were available.

Furthermore, nothing guarantees that this software, even if available for a particular computer system, would be compatible with the accounting, bookkeeping, order processing, or other software used by a particular direct

[14] Apparently, there is at least one company that markets a software product for computing use tax. Westphal, *The Computer's Role in Simplifying Compliance with State and Local Taxation*, 39 Vand. L. Rev. 1097 (1986) (written by the president of the company marketing the product). The article does not disclose the types of computers on which this product will run. For mail order sales, the article states that the "customer would be told on ordering to remit the state and local taxes due. The sales tax rate file then would be used to verify that the correct amount had been remitted." *Id.* at 1101-02. Thus, computers would not solve the problem of incorrect calculation or omission of use tax by consumers. In 1990, this software package cost "approximately $12,000 initially, with a subsequent annual maintenance fee approximating $9,500." White, *Emerging State Use Tax Collection Legislation and the Out-of-State Mail Order Vendor: One Unconstitutional Step Beyond Scripto and National Bellas Hess*, 42 Fla. L. Rev. 775, 796 n.132 (1991) (citing to a May 28, 1990, telephone conversation with Jeff Westphal, Vice President, Vertex, Inc.).

marketer. Thus, manual re-entry of the use tax data might well be necessary for many companies. It also is not established that all of the taxing jurisdictions would accept computer-generated forms for reporting purposes. Thus, manual re-entry of computer generated information onto the forms prescribed by state and local taxing jurisdictions may still be required.

The testimony of direct marketer Alan Glazer before Congress, regarding his company's experience with the 70 sales tax districts in New York State, is instructive in this regard:

> I am saying this with some reluctance, that is to come forward with the following information, although it is known back home: Four years after installing our first computer, and we are now on our second one valued at a half million dollars or more, we are still calculating the sales tax manually for the State of New York because we can't get the computer to differentiate between gross sales and net sales, the difference where people return goods, sales of various items in various districts.
>
> It is easy for people who do not live with a computer to say, based on advertising, oh, the computer will do it. . . .
>
> It is easy to say the computer will handle it. Four years and hundreds of thousands of dollars after installing that system, it does not properly calculate sales tax for 70 different taxing districts.

1985 Hearings at 121-22.

B. The 01.5 Percent Deduction Does Not Remove, or Significantly Ameliorate, the Burdens Imposed on Direct Marketers from Collecting Use Tax.

The North Dakota Supreme Court suggested that the burdens recognized in *Bellas Hess* now have been alleviated significantly because the State of North Dakota allows direct mailers to deduct 01.5 percent of the use tax due as compensation for administrative burdens. App. at A26; N.D. Cent. Code § 57-40.2-07.1 (Supp. 1991). This deduction does not even come close to providing any significant amelioration of the burdens discussed above.

The members of this Coalition may serve as examples. As previously noted, the median gross revenue of the members is $8.5 million. If we assume that one-half of one percent of $8.5 million in sales were to North Dakota customers, the company would have a total sales volume of $42,500 in that state.[15] Applying a tax rate of five percent, the use tax on these sales would be $2,125. One and one-half percent of $2,125—the amount that the direct mailer would retain under the North Dakota deduction—would be $31.87, an amount that would pay few administrative costs, especially if they involved legal and accounting services.

A study by the national accounting firm of Touche, Ross in 1986 reported that use tax compliance costs amounted to almost 16 percent of each dollar of use tax collected. See White, *Emerging State Use Tax Collection Legislation and the Out-of-State Mail Order Vendor*, 42 Fla. L. Rev. at 795 (citing Touche, Ross, *A Study to Determine the Economic Impact on Mail Order Firms of Multistate Sales Tax Collection* (Oct. 1986) (prepared for the Direct Marketing Association)). This may well underestimate compliance costs for small firms, but still would put compliance costs at more than 10 times the amount of the deduction made available by North Dakota.

C. This Case Will Answer the Question About This Court's Views on Burdens.

The question of whether the North Dakota court is correct in finding that this Court has "ignored" the bur-

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[15] One-half of one percent is probably a considerable overestimate. The sales and gross receipts taxes collected by North Dakota in 1989 were only 00.27 percent of the sales and gross receipts taxes collected by all states. Tax Guide at ¶ 210-A (Nov. 6, 1990) (based on U.S. Commerce Department figures).

densome nature of tax collection across jurisdictional lines is mooted by the Court's taking this case.

CONCLUSION

Bellas Hess has provided a clear and workable rule for 25 years. Overruling it would plunge thousands of businesses into a Byzantine administrative and financial nightmare. Mandating the types of measures that conceivably could reduce some of the burdens on direct marketers—such as a de minimis threshold for sales, uniform reporting forms, uniform reporting periods, uniform rates, imposition of a single use tax by states and local jurisdictions combined—would appear to be beyond the competence of any court.

The rule in *Bellas Hess* should be reaffirmed, and the decision of the North Dakota Supreme Court should be reversed.

Respectfully submitted,

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November 21, 1991

APPENDICES

APPENDIX A

MEMBERS OF THE COALITION FOR SMALL DIRECT MARKETERS

Airline Int'l Luggage, Inc.
El Paso, TX

AKA Elephant
San Francisco, CA

All Computer Services
Asheville, NC

American Stationary Company, Inc.
Peru, IN

Arista Surgical Supply Co., Inc.
New York, NY

Aspen Imaging Int'l
Lafayette, CO

Auto Custom Carpets, Inc.
Anniston, AL

AW Direct, Inc.
Kensington, CT

Baron Barclay Bridge Supplies
Louisville, KY

Bass Pro Shops, Inc.
Springfield, MO

Biobottoms, Inc.
Petaluma, CA

Black Box Corporation
Pittsburgh, PA

Bloc Publishing
Coral Gables, FL

Boudin Gifts
San Francisco, CA

Broadcast Services
Four Oaks, NC

Broadcast Supply West
Tacoma, WA

Bulbtronics, Inc.
Farmingdale, NY

Cahill & Company
Washington, DC

Catalog Media Corporation
Memphis, TN

Celebrating Excellence
Lombard, IL

Celebration
Lumberton, NJ

Chelsea & Scott, Ltd. d/b/a One Step Ahead
Deerfield, IL

Christian Book Distributors
Peabody, MA

Communication Industry Corporation/National Audio Visual
E. Rutherford, NJ

Computer Reset
Dallas, TX

Crest Fruit Company
Alamo, TX

CSI Industries
Hudson, IA

CUI, Inc.
Wilmington, NC

Dalco Athletic Lettering
Dallas, TX

Damark International, Inc.
Brooklyn Park, MN

Daniel Smith, Inc.
Seattle, WA

Dartek Computer Supply Corporation
Elmhurst, IL

DAW Industries, Inc.
San Diego, CA

Dental Arts Laboratory, Inc.
Peoria, IL

Desserts Direct, Inc.
Oradell, NJ

Digi-Key Corporation
Thief River Falls, MN

Dunns, Inc.
Grand Junction, TN

Durr-Fillauer Orthopedic, Inc.
Chattanooga, TN

EduCALC, Corporation
Laguna Niguel, CA

Educorp Computer Services
San Diego, CA

Enco Mfg. Co.
Chicago, IL

Enomoto Roses, Inc.
Half Moon Bay, CA

Export USA Publications
Minneapolis, MN

Exposures, Inc.
S. Norwalk, CT

Express Direct
Chicago, IL

Fanfare Enterprises, Inc. d/b/a The Music Stand Catalog
Lebanon, NH

First National Fixture Corporation
Wichita, KS

Fish Net, Inc.
Lancaster, PA

Flight Computing Catalog Div. Azure Tech.
San Jose, CA

French Creek Sheep & Wool Co., Inc.
Elverson, PA

Friddle's Orthopedic Appliances, Inc.
Honea Path, SC

Gall's, Inc.
Lexington, KY

Goodson Shop Supplies
Winona, MN

Gump's
San Francisco, CA

Hello Direct, Inc.
San Jose, CA

Holtkamp Greenhouses, Inc.
Nashville, TN

Humboldt Industries, Inc.
Hazelton, PA

Insight Distribution Network, Inc.
Tempe, AZ

International Microsystems, Inc.
Kutztown, PA

Kansas City Steak Company
Kansas City, MO

Keller Laboratories, Inc.
St. Louis, MO

Key Note Music Group
Ranchos De Taos, NM

King of the Mountain Sports, Inc.
Loveland, CO

Klingspor Abrasives, Inc.
Hickory, NC

Knight's LTD Catalogue
St. Louis, MO

Lakeshore Learning Materials
Carson, CA

Landmark/SuperSoft
Clearwater, FL

LaserColor Labs
West Palm Beach, FL

Layline, Inc.
Raleigh, NC

LCR Corporation
Baton Rouge, LA

Long's Electronics, Inc.
Irondale, AL

Lounsbury, Inc. d/b/a Play Fair Toys
Boulder, CO

Lovejoy Tool Company
Springfield, VT

MacLand, Inc.
Tempe, AZ

Markson Science, Inc.
Phoenix, AZ

Marshal Graphics, Inc.
Hartford, CT

Medical SelfCare, Inc.
Healdsburg, CA

MicroProse Software, Inc.
Hunt Valley, MD

Mid America Designs
Effingham, IL

Mid-American Growers
Granville, IL

Mill Pond Press, Inc.
Venice, FL

Miller Aviation, Inc.
Johnson City, NY

Moore Medical Corporation
New Britain, CT

Museum Of Jewelry
San Francisco, CA

Music For Little People
Redway, CA

Musician's Friend, Inc.
Medford, OR

Mysteries By Mail
Boonville, CA

New England Hobby Supply, Inc.
Manchester, CT

Our Business Machines, Inc.
Irwindale, CA

Outer Banks Marine Outfitters
Beaufort, NC

Overton's Sports Center, Inc.
Greenville, NC

Paper Direct
Lyndhurst, NJ

Parkell
Farmingdale, NY

Pasternack Enterprises
Irvine, CA

Personal Computing Tools, Inc.
Los Gatos, CA

Pinnacle Orchards
Medford, OR

Pittman & Davis, Inc.
Harlingen, TX

Playboy Enterprises, Inc.
Chicago, IL

Plow & Hearth, Inc.
Orange, VA

PMIC
Los Angeles, CA

Practicon, Inc.
Greenville, NC

Production Tool Supply Company
Warren, MI

Professional Displays, Inc.
Covina, CA

Publishing Services, Inc. d/b/a PSI Research
Grants Pass, OR

Pyraponic Industries Inc. II
San Diego, CA

Quartermaster
Long Beach, CA

Ralph Storrs, Inc.
Kankakee, IL

Real Goods Trading Corp.
Ukiah, CA

Reasonable Solutions, Inc.
Medford, OR

Right Start Catalog
Westlake Village, CA

Rio Grande Albuquerque
Albuquerque, NM

Roseco, Inc.
Dallas, TX

Ross-Simons
Cranston, RI

Rutland Tool & Supply Co., Inc.
City of Industry, CA

Save Energy Company
San Francisco, CA

ScandAmerica Corporation
Lexington, KY

Specialized Products Company
Irving, TX

SportsTech Services, Inc.
Tulsa, OK

Stewart-MacDonald
Athens, OH

Storybook Heirlooms
Menlo Park, CA

Strategic Marketing Concepts
Clearwater, FL

Swest, Inc.
Dallas, TX

Sybervision Systems, Inc.
Pleasanton, CA

System Connection
Orem, UT

T-Shirt City, Inc.
Cincinnati, OH

Tasty Baking Company
Philadelphia, PA

The Company Store, Inc.
LaCrosse, WI

Thomas Scientific
Swedesboro, NJ

Tritronics, Inc.
Abingdon, MD

Tweeds, Inc.
Edgewater, NJ

20th Century Plastics
Los Angeles, CA

Venus Swimwear, Ltd.
Jacksonville, FL

W. Atlee Burkee & Co.
Warminster, PA

W.M. Green & Company
Robersonville, NC

West Marine Products
Watsonville, CA

White Flower Farm
Litchfield, CT

Wholesale Trophies, Inc.
Huntsville, AL

Wiese Vet Supply
Eldon, MO

Williams Tool & Hardware Supply
Fort Worth, TX

Wind & Weather
Mendocino, CA

WinterSilks/The White Pine Co., Ltd.
Middleton, WI

Woodworker's Supply Inc.
Casper, WY

APPENDIX B

EXEMPTIONS FROM SALES AND USE TAX IN NORTH DAKOTA

The following are exempt from sales and use tax:

Adjuvants sold to-used by vegetable producers or commercial applicators if required by product warranty
Admissions to state or local fairs—not in publicly owned facility
Advertising, periodicals
Agricultural fertilizers (commercial)
Aircraft (excise taxed)
Aircraft services
Artificial devices for crippled
Auction sales or personalty owned by non retailer
Bad debts (credit or refund)
Basic care facility, sales by-to
Beneficiated coal
Bibles, sales to nonprofit religious organizations
Bladder dysfunction supplies equipment and devices
Boarding homes for aged and infirm (licensed by ND social service board), sales to
Bottled water
Byproducts from processing farm products used for steam or electricity
Canadians, sales to, over $40, pay tax & claim refund for over $25
Charitable activities, receipts from
Churches, regular sales by (all receipts for church use)
Church suppers or bazaar (annual) on public property
Coal, beneficiated
Coal used in agricultural processing or sugar beet refining plants instate or in adjacent states
Coins, legal tender
Components of taxable end-product

Constitutionally exempt
Containers (for manufacturers, etc.)
Contractors, sales to (with certificate)
Credit unions (Fed.-ND)
Crutches
Currency, legal tender
Diabetic supplies (incl. properly dispensed insulin; insulin materials, glucose for insulin reaction, urine and blood testing kits, hypodermic needles etc.)
Disableds—equipment attached or modifying MV or implements of husbandry (motorized), elevators, lifts, etc., for home, sales to
Drugs for feeds (livestock-poultry)
Drugs (prescription)
Educational activities
Electricity
Electronic gaming device (licensed) receipts
Eyeglasses, prescription
Facsimile (FAX) services (not purchases to supply FAX services)
False teeth
Feeds (livestock, poultry, rabbit)
Fertilizers (commercial)
Flight simulators and related equip.
Food-food products (specified staples; not bottled water, diet supplements, alcoholic beverages) off-premise consumption, for humans
Food-food product samples for human consumption on premises
Food for schools
Food samples for eating at food stores
Food stamp sales
Foreclosure sales (mortgagee bid)
Fraternities-sororities, sales by
Fungicides (commercial)
Gasoline (otherwise taxed)
Governments (US agencies, state-local), sales to (certificate)

Health associations (voluntary; nonprofit per IRC)
Hearing aids
Herbicides (commercial)
Hospital services
Hymnals, sales to nonprofit religious organizations
Indian reservation, delivery to Indians on
Indian reservation, sales by non-Indians to Indians
Indian sales on reservation
Insecticides
Insurance premiums
Interstate commerce
Laundries (coin-operated)
Magazine subscriptions
Manufacturing or processing, goods used in (if end-product taxed)
Mfg. mach'y-equip. for new or expanded plant (eff. 7-1-91; was taxed at lower 3% rate)
Meals and related items sold to non-profit org. for delivery to invalids
Medical oxygen by user
Medical research institute (nonprofit), sales to (eff. 7-1-91)
Mobile home rentals (over 30 days by same persons)
Mobile home, resale for first buyer
Money
Montanans, sales to, over $50
Motion picture rentals (admissions taxed)
Motor vehicles (excise-taxed)
MV rentals
Newspapers
Newsprint and ink (for newspapers)
Nursing and intermediate care facilities, sales to
Nursing home services
Occasional sales (not MVs)
Ostomy devices and supplies
Outstate retailers, instate delivery to
Oxygen (prescription)
Periodicals of nonprofit organizations
Periodical subscriptions

Personal Services (separately stated)
Power plant (built post-6-30-91) production equip. (eff. 7-1-91)
Prefab-modular-sectional home rentals (over 30 days)
Prescription drugs
Professional services
Prosthetic devices
Religious activities, receipts from
Religious books sales to nonprofit religious organizations
Rentals, goods (sales-taxed in ND)
Resale, sales for
Room (lodging) rentals (30 day (min.) by same persons)
School districts (public) admissions
School lunch programs, food for
School supplies (private nonprofit schools-colleges)
Schools, food supplies for
Seed treatments, inoculants, fumigants for agriculture (commercial)
Seeds, roots, bulbs, small plants (commercial use)
Services (no goods)
Specially state taxed items (gasoline, insurance premiums)
Steam used for processing farm products
Student meal tickets
Students, food for (college contract)
Subscriptions
Telephone calls (interstate)
Textbooks to students
Textbooks (private nonprofit schools-colleges)
Trade-in for resale item
Transport services—passenger, freight by common carrier (if title passed to buyer)
Upholstery service
Urine testing
Vending machine sales (under .16 cents)
Veterinarian service

Water
Wheelchairs

Use tax exemptions in addition to the above:

Items stored in-state for out-of-state use
Items subject to ND sales tax
Items subject to sales or use tax of another state (if reciprocal)
Nonresident's goods temporarily in-state
Railway cars and locomotives, interstate, plus component parts

All States Tax Guide at ¶ 1340 (June 11, 1991) (citing as source N.D. Cent. Code Ch. 57-39.2 et seq.; L. 1991; H1048, 1308, and 1606, S2098 and 2393).

(19)

No. 91-194

Supreme Court, U.S.
FILED
NOV 21 1991
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

QUILL CORPORATION,
Petitioner,
v.
STATE OF NORTH DAKOTA,
BY AND THROUGH ITS TAX COMMISSIONER,
HEIDI HEITKAMP,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of North Dakota

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BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF MANUFACTURERS; THE NATIONAL ASSOCIATION OF BROADCASTERS; THE AMERICAN ADVERTISING FEDERATION; THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, INC.; THE INDUSTRY COUNCIL ON TANGIBLE ASSETS; AND PRINTING INDUSTRIES OF AMERICA, INC. IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-194

QUILL CORPORATION,
Petitioner,
v.
STATE OF NORTH DAKOTA,
BY AND THROUGH ITS TAX COMMISSIONER,
HEIDI HEITKAMP,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of North Dakota

BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF MANUFACTURERS; THE NATIONAL ASSOCIATION OF BROADCASTERS; THE AMERICAN ADVERTISING FEDERATION; THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, INC.; THE INDUSTRY COUNCIL ON TANGIBLE ASSETS; AND PRINTING INDUSTRIES OF AMERICA, INC. IN SUPPORT OF PETITIONER

INTEREST OF *AMICI* [1]

The National Association of Manufacturers of the United States of America ("NAM") is a voluntary business association of approximately 12,500 companies and

[1] The parties have consented to the filing of this *amici* brief. Their letters of consent are on file with the Clerk of the Court.

subsidiaries, employing eighty-five percent of all manufacturing workers and producing over eighty percent of the nation's manufactured goods. More than 158,000 additional businesses are affiliated with NAM through its Associations Council and National Industrial Council.

The National Association of Broadcasters ("NAB"), organized in 1922, is a non-profit incorporated trade association that serves and represents America's radio and television stations and all the major networks.

The American Advertising Federation ("AAF") is a national trade association encompassing all elements of the advertising industry, including as members companies that produce and advertise consumer products; advertising agencies; magazine and newspaper publishers; radio and television broadcasters; radio and television networks; outdoor advertising organizations; and other media. Its membership also includes twenty-one national trade associations; over two hundred local advertising clubs, with 52,000 members; and over two hundred college chapters, with 6,000 student members.

The American Association of Advertising Agencies, Inc. ("A.A.A.A.") is the national trade association of the advertising agency business. The A.A.A.A. was founded in 1917 and includes as members 760 agencies, which operate more than 1,480 offices in the United States and 810 offices in 72 other countries. A.A.A.A. member agencies and their offices place approximately eighty percent of all agency-produced national advertising in the United States.

The Industry Council On Tangible Assets ("ICTA") is a non-profit trade association incorporated in Washington, D.C. in June, 1983. ICTA's members sell, distribute, trade, import, refine, store, or manufacture tangible assets—defined as, but not limited to, precious metals, numismatic coins, bullion coins, stamps, gems, sportscards, jewelry, antiques and art objects. There are approximately five thousand businesses in the United States, ranging from small "mom and pop" shops to multinational businesses—that buy and sell these tangible assets. These articles are often unique, one-of-a-kind items, such as a particular coin. The nature of the market thus necessitates that collectors use an extensive 50-state network of local dealers to find the specific item they seek. This requires advertising in national trade papers and over computer networks. These weekly and monthly trade papers—published nationally—are a trading market and informational tool for consumers, who can cross-check prices with other dealers and comparison shop, thereby promoting competition and fair business practices.

Printing Industries of America, Inc. ("PIA") is a national trade association representing the interests of firms engaged in the printing business and printing support industries, such as suppliers and dealers. PIA's membership consists of approximately 13,500 member firms, with 31 affiliates throughout the United States and Canada serving specified metropolitan or regional areas. PIA addresses needs of its members that are national in scope.

Amici's members manufacture, sell or advertise goods. Many of those transactions are interstate in nature. *Amici* therefore have a direct interest in preserving the free flow of interstate business and interstate advertising.

North Dakota has asked the Court to overrule the long-standing precedent of *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), in which the Court held that States could not impose a use tax collection duty on a company with no physical presence in the taxing State. This request raises issues of vital significance to all manufacturing, advertising and business interests in this country.

Amici are vitally interested in clear and stable rules upon which businesses may rely in ordering their affairs. The need for a healthy national economy can be facili-

tated only through clarity and predictability in the law. That is why *amici* are concerned that the North Dakota Supreme Court has disregarded clear Supreme Court precedent and has substituted for the *Bellas Hess* "physical presence" test an "economic presence" test specifically rejected by the Court in that decision. *Amici* believe that principles of *stare decisis* counsel against discarding the bright-line test of *Bellas Hess*—upon which business has reasonably relied and structured its affairs—for the unworkable "economic presence" test adopted by the North Dakota Supreme Court. *Amici* also believe that the implications of overruling *Bellas Hess* would extend beyond the facts of this case. Business interests would no longer have confidence that they can rely on clear precedents of this Court, and that loss of confidence would harm the ability of businesses to engage in the efficient economic planning that is necessary to preserve a healthy and competitive national economy.

INTRODUCTION

In *Bellas Hess*, the Court held that States may not impose a use tax collection duty on mail order sellers "who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business." *Bellas Hess*, 386 U.S. at 758. The bright-line "physical presence" test of *Bellas Hess* has been applied repeatedly by lower courts to hold that an interstate business with *no* "physical presence" in the taxing State cannot be subjected to a use tax collection duty.[2]

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[2] *See, e.g., Cally Curtis Co. v. Groppo*, 214 Conn. 292, 572 A.2d 302 (Conn.), *cert. denied*, 111 S.Ct. 77 (1990); *L.L. Bean, Inc. v. Com. Dept. of Revenue*, 516 A.2d 820, 826 (Pa. Cmwlth. 1986); *Good's Furniture House, Inc. v. Iowa State Bd. of Tax Review*, 382 N.W.2d 145, 150 (Iowa), *cert. denied*, 479 U.S. 817 (1986); *Rowe-Genereux, Inc. v. Vermont Dept. of Taxes*, 138 Vt. 130, 411 A.2d 1345, 1349 (Vt. 1980); *see infra* note 16 (discussion of application of *Bellas Hess* test by lower courts).

Although the North Dakota legislature realized that imposing use tax collection duty on companies without any "physical presence" in North Dakota would be prohibited by *Bellas Hess*, absent congressional action, it nevertheless enacted legislation that requires use tax collection by every business that engages in "regular or systematic solicitation," even if that business does not have a physical presence in the State. N.D.C.C. § 57-40.2-01(7).[3] However, Congress declined to enact enabling legislation (*see* Point II, *infra*), so North Dakota's Tax Commissioner brought an action in state court seeking a declaration that Quill Corporation ("Quill") was required to collect use tax on its interstate sales to North Dakota residents. *State of North Dakota v. Quill Corp.*, 470 N.W.2d 203, 205 (1991). The state trial court granted summary judgment in Quill's favor, finding the statute unconstitutional as applied to Quill because North Dakota had failed to establish nexus under the *Bellas Hess* physical presence test. *Id.* at 205-06.

The North Dakota Supreme Court reversed. It held that the bright-line physical presence test of *Bellas Hess* should be abandoned, because the "burgeoning technological advances of the 1970's and 1980's have created revolutionary communications abilities and marketing methods which were undreamed of in 1967," when *Bellas Hess* was decided, and because the "sheer volume" of direct mail transactions had increased since the *Bellas Hess* decision. *Id.* at 208-09. The North Dakota Supreme Court applied an "economic presence" test taken directly from Justice

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[3] North Dakota House Concurrent Resolution No. 3083, 1987 Session Laws, Chapter 851 (Apr. 2, 1987), urged the United States Congress to "enact legislation to allow imposition of state sales and use taxes on mail order sales to purchasers within a state by out-of-state mail order companies," because North Dakota recognized that *Bellas Hess* precludes imposition of use tax collection duties on mail-order companies whose only connection to the State is through the mail and common carriers.

Fortas' *dissent* in *Bellas Hess*, *id.* at 214, and concluded that Quill's economic presence in North Dakota was sufficient to support imposition of a use tax collection duty. *Id.* at 216.

Quill is a direct mail order seller engaged in an interstate business. Like the mail order company in *Bellas Hess*, Quill has no stores, warehouses, sales agents or other "physical" contacts with the State seeking to impose the collection duty. Furthermore, Quill's "economic" presence in North Dakota is substantially less than the economic presence *Bellas Hess* had in Illinois: the interstate sales at issue in *Bellas Hess* were approximately $2 million per year, which is *twice* the dollar value of the interstate sales at issue in this case. *Id.* at 204.[4] By any measure, *Bellas Hess* had a greater "economic presence" in the taxing State than does the petitioner here.

Under the test of *Bellas Hess*, Quill could not be subjected to a use tax collection duty. To uphold application of the North Dakota statute to Quill, therefore, the Court must overrule *Bellas Hess*. The justifications advanced by the North Dakota Supreme Court for such a drastic step are not supported by the case law or the record. The legal and factual underpinnings of *Bellas Hess* remain valid, and the "physical presence" test has proven to be a clear and workable test upon which business has justifiably relied in ordering its affairs.

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[4] Nothing in the language or holding of *Bellas Hess* suggested that the holding would have been different if the company's use of the mails and of common carriers had produced sales to Illinois residents of $3 million, $10 million or $20 million, rather than the $2 million in sales at issue. *See generally Bellas Hess*, 386 U.S. at 761.

SUMMARY OF ARGUMENT

Clarity and stability are essential ingredients of laws that govern business conduct and expectations. Clear and stable rules facilitate rational and efficient business planning and minimize needless and wasteful litigation. Rules that permit such ordered planning and invite reliance upon settled principles further the purposes of the Commerce Clause. The principle of *stare decisis* encourages reliance on clear precedent and enables the business community to order its affairs and contribute to a healthy and competitive economy. Point I.

The "physical presence" test established by *Bellas Hess*, and applied by this Court and lower courts for a quarter century, is a clear and workable test that has enabled business to plan investments with knowledge of potential tax liability. Because of the long-standing nature of the *Bellas Hess* test and the ease of its application to investment planning, the business community has justifiably relied on it. The extensive reliance by the business community supports the application of *stare decisis*, which has greatest force in cases involving business and property rights. Furthermore, the fact that Congress has declined to exercise its Commerce Clause power to change the rule of *Bellas Hess*, though repeatedly urged to do so, is another weighty consideration in favor of *stare decisis*. Point II.

The "economic presence" test adopted by the North Dakota Supreme Court, and advocated by the dissent in *Bellas Hess*, is inherently unworkable. If the Court were to overrule *Bellas Hess* and rule that "economic presence" is sufficient to justify a use tax collection duty, business interests would not know how much, or what types of, economic presence would be constitutionally sufficient to trigger that duty. In future cases, the Court would be required to draw "economic" lines to develop a workable test of "economic presence." During that case-by-case determination of an "economic presence" test, interstate

businesses would be unsure of their use tax obligations, and would be compelled to pay tax assessments and implement costly compliance mechanisms that might later be found unjustified.

Whether to change the test of *Bellas Hess*, and, if so, how to define "economic presence," are policy judgments better left to Congress. Congress is institutionally better equipped to weigh the interests of the States against the interests of interstate businesses, and to decide which rule best serves the purposes of the Commerce Clause. Point III.

ARGUMENT

I. RULES GOVERNING BUSINESS CONDUCT AND EXPECTATIONS SHOULD BE BOTH CLEAR AND STABLE.

The Framers understood that "[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them." THE FEDERALIST PAPERS, No. 78, at 471 (A. Hamilton) (C. Rossiter ed., 1961). Clear, bright-line rules obviously facilitate the ordering of business affairs and predictability, and minimize "arbitrary discretion" not only by courts, but also by taxing authorities. Moreover, the doctrine of *stare decisis* is a "basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon 'an arbitrary discretion.'" *Patterson v. McLean Credit Union*, 109 S. Ct. 2363, 2370 (1989).

A. A Healthy and Competitive Economy Requires Clear Rules.

Clarity in the law is important to businesses and to the goal of a healthy economy. The need for clear rules is particularly acute in the area of taxation, which directly

affects the profitability of calculated business activity. Businesses must be able to invest and act with knowledge of the actual tax burdens they will bear. Constitutional rules that "balance" state versus federal interests on an *ad hoc* basis generate crippling uncertainty. Rules that provide predictable outcomes foster reliance and therefore promote business activity and a healthy national economy. "Certainty allows businesses to plan and businesses which plan are more efficient and profitable."[5] Collecting use taxes—potentially for 6,500 State and local jurisdictions—[6] is a significant administrative burden, and the unreimbursed costs of collection are often quite substantial.[7] Thus, in making virtually every decision—what business to engage in, how to do it, where to solicit business, and where to make investments in plant, warehouse and property—companies must consider whether they will

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[5] Daniel T. White, *Emerging State Use Tax Collection Legislation and the Out-of-State Mail Order Vendor: One Unconstitutional Step Beyond Scripto and National Bellas Hess*, 42 Fla. L. Rev. 775, 794 (1990); *see also* Jurinski, *Agency Relationships in Determining Nexus: Groping for a Solution*, 7 J. of State Taxation 321, 321 (1989) ("A basic tenet of our system of taxation is that taxpayers may arrange their affairs to minimize their tax liabilities. Unlike tax evasion, tax avoidance through careful planning of both transactions and corporate structures is a legitimate right of every taxpayer."); Walter Nagel, *The Emergence of A Single Nexus Standard*, Tax Notes (Tax Analysts) 327, 334 (Oct. 16, 1989) ("Uncertainty [about tax obligations] is also undesirable from a taxpayer's perspective because it does not allow for planning.").

[6] White, *supra* note 5, at 801; Note, *Collecting the Use Tax on Mail-Order Sales*, 79 Geo. L.J. 535, 539 (1991).

[7] *See infra* Point III (outlining the substantial administrative burdens of use tax collection in potentially thousands of State and local jurisdictions). Payment of the collected use tax to the taxing jurisdiction fully satisfies the jurisdiction's claim for payment for services it has ostensibly provided to the *user*. Thus, the unreimbursed cost of collection is simply a tax on engaging in interstate commerce, imposed on the interstate seller, *not* on the "use" of the seller's product in the taxing jurisdiction.

be required to collect use taxes. Uncertainty concerning these potential obligations frustrates rational business planning.[8]

Clear, certain and bright-line rules in the area of taxation facilitate reasonable foreseeability, allowing the vendor "prudently to arrange the business contacts with that State knowing the full ramifications of such actions."[9] In the absence of clear rules, businesses are unable to make rational and informed decisions concerning risk and investment. In fact, clarity regarding legal obligations is so essential to an efficient marketplace that in most circumstances it is more important that the rule be clear, than that it be the "best" rule.[10]

B. A Healthy and Competitive Economy Requires Stable Rules.

Clarity of legal obligations is necessary to an efficient marketplace, but is not sufficient. A clear rule that is subject to change will frustrate rational business planning as much as a rule that is itself unclear. This Court has long recognized that *stare decisis* is the "preferred course"

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[8] Use tax collection duties may also subject businesses to related penalties and liabilities that differ from one State to the next and among local communities.

[9] White, *supra* note 5, at 793-94; Jurinski, *supra* note 5, at 330 ("Tax compliance can be effective only if statutes, regulations, and case law provide bright lines for planning."); *see also* Nagel, *supra* note 5, at 334.

[10] *See Sheddon v. Goodrich*, 8 Ves. 481, 497, 32 Eng. Rep. 441, 447 (Ch. 1803) (in case involving property interests, declining to revisit whether doctrine properly decided because "it is better the law should be certain, than that every Judge should speculate upon improvements"); *see also* J. Macey, *Costs and Benefits of Stare Decisis*, 65 Chi. Kent L. Rev. 93, 109 (1989) (advocating the importance of *stare decisis*, particularly in "corporate and contractual settings" where "having the 'correct' legal rule is less important than the consistent application of a precisely articulated rule").

because it "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 111 S. Ct. 2597, 2609 (1991).

The need for stability is one of the major factors compelling application of *stare decisis* principles.[11] "When rights have been created or modified in reliance on established rules of law, the arguments against their change have special force." *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272 (1980). Thus, *stare decisis* is an "important social policy" that permits society to "satisfy reasonable expectations," *Helvering v. Hallock*, 309 U.S. 106, 119 (1940), and to "presume that bedrock principles are founded in the law rather than in the proclivities of individuals." *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986).

Stare decisis is particularly appropriate in Commerce Clause cases because the purpose of the Commerce Clause is to promote a healthy national economy, and adherence to established rules furthers that objective. Adherence to established rules, including constitutionally-based rules, is important because "ready alteration of constitutional rules makes the effects of statutes and private bargains less predictable." Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 Cornell L. Rev. 422, 431 (1988). Thus, "[c]onsiderations in favor of *stare decisis* are at their acme in cases involving property and

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[11] *Irwin v. Veteran's Admin.*, 111 S. Ct. 453, 460 n. 3 (1990) (White, J., concurring) (*stare decisis* is of " 'fundamental importance to the rule of law' . . . because, among other things, it promotes stability and protects expectations") (citations omitted); *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439, 2452 (1991) ("At its core, *stare decisis* allows those affected by the law to order their affairs without fear that the established law upon which they rely will suddenly be pulled out from under them.") (O'Connor, J., dissenting).

contract rights, where reliance interests are involved." *Payne v. Tennessee*, 111 S. Ct. at 2610.[12]

A healthy economy requires long-term investments.[13] Uncertainty concerning profitability discourages long-term investments more than it discourages short-term investments. For virtually all long-term investments, reliable predictions of profitability require a legal landscape that is likely to remain unchanged for several years. Here, substantial long-term investments *have* been made in mail order and other interstate businesses based on the expectation that the "physical presence" test established in *Bellas Hess* would continue to be the law. If the Court had announced in *Bellas Hess* that its clear test was subject to change without notice, many of these investments would not have been made. Encouraging long-term investment is essential to a healthy economy, and rules that are both clear *and* stable are the necessary foundation for such investments.

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[12] *See The Propeller Genesee Chief v. Fitzhugh*, 12 How. 443, 458, 13 L.Ed. 1058, 1065 (1851) (holding that "*stare decisis* is the safe and established rule of judicial policy, and should always be adhered to" in cases that "decide any question of property, or lay down any rule by which the right of property should be determined"); *National Bank of Genesee v. Whitney*, 103 U.S. 443, 444 (1881) ("The prosperity of a commercial community depends, in a great degree, upon the stability of the rules by which its transactions are governed." *See also Oregon ex rel. State Land Bd. v. Corvallis Sand and Gravel Co.*, 429 U.S. 363, 381 (1977) (holding that substantive rules governing real property are "peculiarly subject to the principle of *stare decisis*"); *United States v. Title Ins. & Trust Co.*, 265 U.S. 472, 486-87 (1924) (same).

[13] Peter F. Drucker, THE NEW REALITIES 123 (1989) ("investment" is the "world economy's economic driver" and the key to maintenance of a competitive economy).

II. THE COURT SHOULD NOT OVERRULE THE "PHYSICAL PRESENCE" TEST ESTABLISHED IN *BELLAS HESS* BECAUSE IT IS CLEAR AND WORKABLE, AND BECAUSE BUSINESS HAS JUSTIFIABLY RELIED ON IT.

For the foregoing reasons, in the business context particularly, "[v]ery weighty considerations underlie the principle that courts should not lightly overrule past decisions." *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970). A party asking the Court to overrule established law governing business expectations must meet a "severe burden" of demonstrating why the "broader societal interests in evenhanded, consistent, and predictable application of legal rules" should not outweigh any asserted need for change. *Thomas v. Washington Gas Light Co.*, 448 U.S. at 272.[14] Indeed, "any departure from the doctrine of *stare decisis* demands special justification." *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984); *see also Patterson v. McLean Credit Union*, 109 S. Ct. 2363, 2370 (1989).

A "special justification" may be found to exist where the precedent has proven to be "an unworkable decision" that has caused confusion, *Patterson*, 109 S. Ct. at 2371 (citations omitted), or where there has been little reliance

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[14] The Court has also held that in the area of business and commerce, where fostering reliance is most essential, the possibility that a precedent may have been wrongly decided is not sufficient justification to overrule that precedent unless it was unworkable, engendered unpredictability, or was itself an aberration from prior precedent. *See National Bank v. Whitney*, 103 U.S. at 444 (holding that "[j]udicial decisions affecting the business interests of the country should not be disturbed except for the most cogent reasons, certainly not because of subsequent doubt as to their soundness"); *cf. Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468, 496 (1987) (Scalia, J., concurring) (recognizing that precedent of state immunity from individual suits long assumed to be the law, and the basis for numerous federal statutes, should not be overruled "[e]ven if we were now to find that assumption [of immunity] to have been wrong").

on the precedent. *Thomas v. Washington Gas Light Co.*, 448 U.S. at 272; *id.* at 277 (declining to preserve precedent that "could only breed uncertainty and unpredictability" and that "has been so rarely followed" that "there appears to be little danger that there has been any significant reliance on its rule"). In this case, North Dakota has failed to meet its "severe burden" of demonstrating a "special justification" to overrule *Bellas Hess*. As demonstrated below, the "physical presence" test of *Bellas Hess* has proven to be clear and workable, and there has been widespread and justifiable reliance on that test by the business community.

A. The *Bellas Hess* Test Is Clear And Workable.

In *Bellas Hess*, the Court held that a State may not impose a use tax collection duty on a "seller whose only connection with customers in the State is by common carrier or the United States mail." 386 U.S. at 758. As one commentator has noted, this "bright line test . . . aids in achieving certainty, and allows mail order businesses to plan," because "[r]equiring physical situs in a taxing state through either agents or property provides mail order vendors with a clear understanding of the potential ramifications of their business arrangements."[15] Lower courts have had no difficulty applying the simple *Bellas Hess* test that lack of *any* physical presence in the taxing State is sufficient to excuse any use tax collection duty.[16]

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[15] White, *supra* note 5, at 794.

[16] Although courts have been asked in some cases to determine whether a particular "type" of physical contact with a taxing state constitutes sufficient nexus, there has been no question that where the only contact is through common carrier or mail, the state cannot impose a use tax collection duty. *See, e.g., L.L. Bean, Inc. v. Com. Dept. of Revenue*, 516 A.2d 820, 826 (Pa. Cmwlth. 1986) (holding that determination of nexus is a factual question, but no question that imposition of collection duties is prohibited on "out-of-state mail-order firms whose only connection with the taxing state is soliciting and filling orders through the stream of interstate commerce"); *Good's Furniture House, Inc. v. Iowa State Bd. of Tax Review*, 382 N.W.2d 145, 150 (Iowa) (sufficient nexus where out-of-state seller utilized own trucks to make deliveries to State, but reiterating that nexus "cannot be found where the out-of-state seller merely communicates with customers in the taxing state by mail or common carrier as in National Bellas Hess"), *cert. denied*, 479 U.S. 817 (1986); *Rowe-Genereux, Inc. v. Vermont Dept. of Taxes*, 138 Vt. 130, 411 A.2d 1345, 1349 (Vt. 1980) (holding that "requisite nexus can be found in the case of a mail order seller with retail outlets, solicitors or property within the taxing state . . . but cannot be found where the out-of-state seller merely communicates with customers in the taxing state by mail or common carrier as in National Bellas Hess"); *see also S.F.A. Folio Collections v. Bannon*, 585 A.2d 666, 670-71 (Conn.) (same), *cert. denied*, 111 S. Ct. 2839 (1991); *Cally Curtis Co. v. Groppo*, 214 Conn. 292, 572 A.2d 302 (Conn.) (same), *cert. denied*, 111 S. Ct. 77 (1990); *Burke & Sons Oil Co. v. Director of Revenue*, 757 S.W.2d 278, 280 (Mo. App. 1988) (same).

Even though the Tennessee Supreme Court recognized the validity of the *Bellas Hess* rule last year, *Pearle Health Services, Inc. v. Taylor*, 799 S.W.2d 655 (Tenn. 1990), a lower court recently held that Tennessee could impose a use tax collection duty on direct mail operators with no physical presence in the state. *SFA Folio Collections, Inc. v. Huddleston*, No. 89-3015-III (Davidson Cty. Chancery Ct. Tenn. Mar. 11, 1991); *Bloomingdale's By Mail Ltd. v. Huddleston*, No. 89-3017-II (Davidson Cty. Chancery Ct. Tenn. Mar. 8, 1991). The *Bloomingdale's* case is on appeal to the Tennessee Supreme Court and the *SFA Folio* case has been stayed pending the outcome of the *Bloomingdale's* appeal.

B. Business Has Justifiably Relied On The *Bellas Hess* Test.

Business reliance on *Bellas Hess* has been substantial and justified.[17] Reliance on Supreme Court decisions is rational and expected. Indeed, business should be *encouraged* to order its affairs in reliance on rules established by judicial precedent. In *National Bank of Genesee v. Whitney*, 103 U.S. 443 (1881), the Court refused to over-

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[17] *See* Brief *Amicus Curiae* of the Direct Marketing Association In Support of the Petition for Certiorari and In Support of Summary Reversal, No. 91-194, at 2 (Filed Sept. 3, 1991).

rule a precedent—even though it questioned the "soundness" of it—because the Court *presumed* that business had relied on the precedent:

> The Construction of the Act of Congress thus given has been acted upon by the national banks throughout the country ever since it was published. It is not unreasonable to *suppose* that they have conducted their business and made loans to a large amount in reliance upon it, and that in many cases great injury would follow a departure from it. Judicial decisions affecting the business interests of the country should not be disturbed except for the most cogent reasons, certainly not because of subsequent doubt as to their soundness. The prosperity of a commercial community depends, in a great degree, upon the stability of the rules by which its transactions are governed.

Id. at 444 (emphasis added).[18] In this case, business interests have in fact relied upon *Bellas Hess*. Direct mail order companies and other interstate businesses have designed their operations and planned their investments in reliance on the "physical presence" test. Their reliance in fact is an even more compelling argument for *stare decisis* than the "supposed" reliance in *Whitney*. In light of this actual and substantial reliance, the argument for *stare decisis* has "special force" in this case. *Thomas v. Washington Gas Light Co.*, 448 U.S. at 273.

That reliance has been fully justified because courts, including this Court, have consistently reaffirmed and applied the test of *Bellas Hess*, and this Court has never intimated that *Bellas Hess* might be overruled.[19]

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[18] *See The Propeller Genesee Chief v. Fitzhugh*, *supra* note 12, in which the court said it would be "bound to follow" business precedent.

[19] *See, e.g., D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 32-33 (1988) (finding " 'nexus' aplenty" with Louisiana and finding case distinguishable from *Bellas Hess* because D.H. Holmes had thirteen stores in Louisiana while Bellas Hess' "only connection with its Illinois customers was by mail or common carrier"); *Nat. Geographic Soc. v. Cal. Bd. of Equalization*, 430 U.S. 551, 559 (1977) (reaffirming "sharp distinction" between mail order companies in the State like Bellas Hess "who do no more than communicate with customers by mail or common carrier as part of a general interstate business" and those that have a "physical" presence within the taxing State); *see also Goldberg v. Sweet*, 109 S. Ct. 582, 589-90 (1989) (holding that taxation of interstate telephone call in State of origination and termination where service address is listed or bill is paid is permissible, but expressing "doubt that termination of an interstate telephone call, by itself, provides a substantial enough nexus for a State to tax a call," citing the *Bellas Hess* holding that "receipt of mail provides insufficient nexus"). Indeed, this Court denied certiorari in two recent cases where lower courts upheld the validity of the "physical presence" test of *Bellas Hess* and rejected arguments similar to those raised by North Dakota in this case. *See S.F.A. Folio Collections v. Bannon*, 585 A.2d 666, 670-71 (Conn.), *cert. denied*, 111 S. Ct. 2839 (1991); *Cally Curtis Co. v. Groppo*, 214 Conn. 292, 572 A.2d 302 (Conn.), *cert. denied*, 111 S. Ct. 77 (1990).

The substantial reliance on the precedent of *Bellas Hess* by business interests here thus distinguishes this case from *Arkansas Elec. Co-Op. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 392 (1983), where the Court abandoned the bright line test of *Public Util. Comm'n of R.I. v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927). In *Arkansas Electric*, the Court could "see no strong reliance interests that would be threatened" by rejection of the prior test. The contrary is true in this case.

The doctrine of *stare decisis* has greatest force in cases of congressional domain where Congress has the authority to enact legislation that alters the rule established by the Court.[20] Although this case deals with a constitu-

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[20] *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1931) (Brandeis, J., dissenting) ("Stare decisis is usually the wise policy . . . even where the error is a matter of serious concern, provided correction can be had by legislation"); *see also Flood v. Kuhn*, 407 U.S. 258, 283 (1972). The Court has at times indicated that it may be most bound by principles of *stare decisis* in cases involving statutory interpretation, because Congress can change

tionally-based rule, precedents based on the "dormant" aspect of the Commerce Clause are very different from precedents based on the First Amendment, the Fourth Amendment, or other provisions of the Constitution that are designed to *restrict* the power of Congress. Congress has plenary power under the Commerce Clause, and could by statute modify the rules governing States' imposition of use tax collection duties. *See Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 423 (1946) (Congressional authority over interstate commerce is "plenary" and "supreme").[21] Because Congress has the authority to change the test established in *Bellas Hess* and adopt an economic presence test, the Court should be more reluctant to over-

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those precedents by statute (and presumably would have an incentive to do so if the Court had interpreted the statute in a way not intended by Congress), and less bound by principles of *stare decisis* in cases involving questions of constitutional interpretation, because Congress cannot ordinarily change constitutional precedents by statute. *See Payne v. Tennessee*, 111 S.Ct. at 2609-10 ("*Stare decisis* is not an inexorable command. . . . This is particularly true in constitutional cases, because in such cases 'correction through legislative action is practically impossible'") (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. at 407 (Brandeis, J., dissenting)). Commentators have criticized the constitutional/statutory distinction in *stare decisis* jurisprudence on the grounds that "[r]eady overruling of constitutional cases . . . reduces the stability of governmental institutions," *see* Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 Cornell L. Rev. 422, 430 (1988), and that often the "results," if not the decisions, "can be 'overruled' by statute." Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 Colum. L. Rev. 723, 742 (1988). In any event, this case is more akin to statutory interpretation cases because under the Commerce Clause Congress has the constitutional authority to change the test established by *Bellas Hess* if it believes a different test is warranted.

[21] *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204, 213 (1983) ("The Commerce Clause is a grant of authority to Congress, and not a restriction on the authority of that body.").

rule *Bellas Hess* than it would be to overrule decisions based on provisions of the Constitution that restrict congressional power.

Moreover, Congress is fully aware of the *Bellas Hess* test and through the years has considered legislation to change that test.[22] Congress has conducted hearings and commissioned studies to evaluate state use taxes and use tax collection duties.[23] But Congress has declined to enact such legislation, leaving the test of *Bellas Hess* undisturbed. It is difficult to discern congressional intent from congressional silence, but the refusal of Congress to exercise its plenary power to change a "negative" Commerce Clause ruling of this Court should counsel against adoption of a new rule Congress has considered, but declined to adopt.[24] The *Bellas Hess* test should thus be retained, and any revision left to Congress.

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[22] Legislation proposing a uniform federal response to state imposition of use tax collection obligations has been introduced numerous times. *See, e.g.*, H.R. 2230, 101st Cong., 1st Sess., 135 Cong. Rec. H1662 (daily ed. May 4, 1989); S. 480, 101st Cong., 1st Sess., 135 Cong. Rec. S1920 (daily ed. Mar. 1, 1989); H.R. 3521, 100th Cong., 1st Sess., 133 Cong. Rec. H8916 (daily ed. Oct. 21, 1987); H.R. 1242, 100th Cong., 1st Sess., 133 Cong. Rec. H835 (daily ed. Feb. 25, 1987); S. 1099, 100th Cong., 1st Sess., 133 Cong. Rec. S5600 (daily ed. Apr. 28, 1987); S. 639, 100th Cong., 1st Sess., 133 Cong. Rec. S2682 (daily ed. Mar. 3, 1987).

[23] *See Interstate Sales Tax Collection Act of 1987 and the Equity in Interstate Competition Act of 1987: Hearings Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary to Consider H.R. 1242, H.R. 1891 and H.R. 3521*, 100th Cong., 2d Sess. (1988); *Collection of State Sales and Use Taxes by Out-of-State Vendors: Hearings Before the Subcomm. on Taxation and Debt Management of the Senate Comm. on Finance to Consider S. 639 and related S. 1099, the Equity in Interstate Competition Act of 1987*, 100th Cong., 1st Sess. (1987).

[24] *Cf. Bob Jones University v. United States*, 461 U.S. 574, 600-01 (1983) (holding that Court's general reluctance to rely on congressional silence inapplicable in situation where Congress by

III. THE GREATER AMBIGUITY OF AN "ECONOMIC PRESENCE" TEST WOULD JEOPARDIZE RATIONAL BUSINESS PLANNING AND INVOLVE THE COURT IN POLICY JUDGMENTS BETTER LEFT TO CONGRESS.

When the Court has determined that precedent must be overruled, it has often done so to substitute a clearer and more workable rule. *See, e.g., California v. Acevedo*, 111 S. Ct. 1982 (1991). That justification does not apply here. The "economic presence" test adopted by the North Dakota Supreme Court, and urged by several States, is inherently less certain than the *Bellas Hess* "physical presence" test. For example, many state statutes—including the North Dakota statute at issue in this case—impose use tax collection duties on retailers (including direct mail businesses) who solicit sales on a "continuous," "regular," "systematic," "purposeful," "substantial" or "recurring" basis.[25] The uncertainty of such an

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holding hearings and considering several bills on the precise issue without taking any action demonstrated that it had "prolonged and acute awareness" of the issue and "acquiesced" in the status of the administrative rulings at issue); *see also Flood v. Kuhn*, 407 U.S. at 283 (recognizing that inapplicability of antitrust laws to major league baseball was an "aberration," but declining to overrule precedent in light of congressional awareness of issue and congressional decision not to enact different legislation); *Square D. Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409, 424 (1986) (declining to overrule *Keogh v. Chicago & Northwestern R. Co.*, 260 U.S. 156 (1922), where rule had received "careful, intense and sustained congressional awareness" and Congress chose not to change the rule).

[25] *See* Ariz. Rev. Stat. Ann. § 42-1401(5)(b) (1991) ("substantial and recurring"); Ark. Stat. Ann. § 26-53-121(b) (Supp. 1989) ("continuous, regular or systematic"); Conn. Gen. Stat. Ann. §§ 12-407(12)(g) & (15)(e) (West Supp. 1991) ("regular or systematic"); Fla. Stat. § 212.0596(2)(e) (West Supp. 1991) ("purposefully or systematically"); Ga. Code Ann. § 48-8-2(3)(H) (Supp. 1991) ("regular or systematic"); Kan. Stat. Ann. § 79-3702(h)(2) (Supp. 1990) ("regular or systematic"); La. Rev. Stat. Ann. § 47:301(4)(1) (West Supp. 1991) ("regular or systematic");

economic presence test will create widespread confusion. Interstate business will be forced to speculate whether their solicitations are sufficiently regular, systematic or substantial to subject them to use tax duties, and will be unable to forecast tax liability and investment risk. Courts will be forced to decide countless issues: what is the meaning of "regular" or "systematic"; whether solicitations that are substantial in number but not "continuous" are sufficient; and whether requiring use tax collection for a "purposeful" but "slight" economic presence unduly burdens interstate commerce.

Indeed, the North Dakota statute at issue in this case is likely to spawn additional litigation. North Dakota requires use tax collection by every business that engages in "regular or systematic solicitation." N.D.C.C. § 57-40.2-01(7). The North Dakota Administrative Code defines "regular or systematic solicitation" as "three or more separate transmittances of any advertisement or advertisements" during a twelve-month period. N.D.A.C. § 81-04.1-01-03.1. Thus, even if the Court determines in this case that Quill's solicitations in North Dakota would be sufficient under a constitutionally-based "economic presence" test to justify a use tax collection duty, the Court will be required in future cases to determine whether a company with merely three, five or ten solici-

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Mass. Ann. Laws ch. 64H § 1 (West Supp. 1991) ("regularly or systematically"); Minn. Stat. Ann. § 297A.21, subd. 4(a) (1991) ("regular or systematic"); Mo. Ann. Stat. § 144.605(2)(a) (Vernon Supp. 1991) ("purposefully or systematically"); N.C. Gen. Stat. § 105-164.8(b)(5) (Supp. 1991) ("purposefully or systematically"); Okla. Stat. Ann. tit. 68, § 1354.2 (West Supp. 1992) ("continuous, regular or systematic"); Pa. Stat. Ann. tit. 72, § 7201(b)(3) (Purdon 1990) ("regularly or substantially"); R.I. Gen. Laws §§ 44-18-15(1)(E) & -23(c) (Michie Supp. 1990) ("regular or systematic") Tenn. Code Ann. § 67-6-102(6)(J) (1989) ("regular or systematic"); Utah Code Ann. §§ 59-12-102(9)(c) & (17)(b) (Michie Supp. 1991) ("regular or systematic"); Vt. Stat. Ann. tit. 32, § 9701(9)(F) (Supp. 1990) ("regular, systematic or seasonal").

tations (and no physical presence in North Dakota) may constitutionally be compelled to collect use tax. The Court will also be required, when reviewing other state statutes or local ordinances that focus on sales rather than on solicitations, to determine whether $1,000 of business, or ten sales, constitutes sufficient economic presence to justify the burden on interstate commerce created by use tax collection duties. Those "economic" lines cannot be established in this case, which involves the solicitations of one company in one taxing locale. Furthermore, determining where the "economic" line should be drawn is a policy judgment better left to Congress.

Even if the Court could engage in case-by-case adjudication until a clear and workable definition of "economic presence" emerges, in the interim, interstate businesses will be unable to order their affairs and plan their investments with reasonable certainty. Although businesses can easily comply with the physical presence test of *Bellas Hess* by not placing stores, warehouses or salespeople in a particular State, unless and until an "economic presence" test is spelled out precisely in future cases, businesses will be unable to gauge their use tax collection duties with reasonable certainty.

Moreover, the factual predicate for the *Bellas Hess* test remains entirely valid. The burden of collection that North Dakota (and other States and localities) would impose on interstate commerce would even be compounded by the greater volume of mail order sales and the greater number of local taxing jurisdictions.[26] Despite the advent

[26] The North Dakota Supreme Court justified its departure from *Bellas Hess*, in part, on the ground that the percentage of sales from mail order companies, as compared with those of in-state retailers, has supposedly increased since *Bellas Hess* was decided. *Id.* at 209-10. It is pure conjecture to suppose, however, that this Court would have decided *Bellas Hess* differently had mail order companies in general had a greater percentage of overall sales in

of new computer technology that might be utilized to facilitate compliance with use tax collection duties, enormous and costly administrative burdens remain.[27] Although computer tax programs can (at significant expense) track different tax *rates*, computers cannot take account of myriad *exemptions* from tax (for both purchasers and goods) that are authorized by many statutes and local ordinances. *See* Brief *Amicus Curiae* of the Direct Marketing Association in Support of the Petition for Certiorari and In Support of Summary Reversal, No.

Illinois. In fact, the *Bellas Hess* Court—concluding that it would be "difficult to conceive of commercial transactions more exclusively interstate in character than the mail order transactions" there (and here) involved—held explicitly that the tax collection duty could not be imposed because of the *burden* that such taxation would impose on the mail order company. Those burdens have increased. When *Bellas Hess* was decided, only 11 states and 2,300 jurisdictions imposed use taxes. *Bellas Hess*, 386 U.S. at 758-59 & nn.11, 12. The Court nevertheless found the collection duty burdensome because of the "many variations in rates of tax, *in allowable exemptions* and in administrative and record-keeping requirements." *Id.* at 759 (emphasis added). Today, over 6,500 jurisdictions impose their own use taxes. Note, *supra* note 6, at 539. If the rule urged by North Dakota is adopted, 6,500 jurisdictions might require use tax collection by companies without physical presence in their respective jurisdictions.

[27] For example, many of *amicus* ICTA's members are small shops with few or no employees. For them, the administrative costs of collecting various use taxes and keeping current on the use tax laws and regulations of many jurisdictions would be prohibitive. Many of these members do not have computer systems, other than word processing programs for mailing lists and inventory management. In most coin shops, for example, bookkeeping is done manually. Monitoring and complying with a plethora of state and local tax requirements would be impossible, forcing small dealers out of business or restricting their ability to sell to collectors in states with use tax collection duties, thereby creating a less competitive market for consumers. Several "mom and pop" businesses have indicated to ICTA that they will either cease to advertise or cease business operations if advertising is deemed sufficient to create nexus for the purpose of use tax collection.

91-194, at 10-13 (Sept. 3, 1991).[28] Additionally, an independent study has shown that the average mail order firm spends fifteen percent of tax collected on compliance costs, while being reimbursed by the taxing State at the rate of only one percent. TOUCHE ROSS, *A Study to Determine the Economic Impact on Mail Order Firms of Multi-State Sales Tax Collection*, at 5 (1986).[29] If companies were required to collect use taxes in jurisdictions where they have no physical presence, those costs would substantially increase. Thus, the expansion of tax liability entailed by the North Dakota Supreme Court's rule would seriously hamper interstate commerce.

If these burdens are to be imposed on interstate commerce, in derogation of the *Bellas Hess* rule, the change should be accomplished by Congress, not the Court. In many areas the Constitution requires considerable deference to the views of the States. The Commerce Clause, however, gives Congress plenary power: "Congress shall have Power . . . [t]o regulate Commerce with Foreign Nations, and among the several States, and with the Indian Tribes." Constitution, Art. 1, § 8, Cl. 3; *see Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 423 (1946) (the power of Congress over interstate commerce is "plenary" and "supreme"). By entrusting the responsi-

[28] *See also* Levering, *An Examination of the Merits of Federal Legislation to Require Out-of-State Mail Order Companies to Collect State Use Taxes*, 4 N.Y.U. Inst. on St. and Local Tax'n, § 8.03 [1], at 8-12 (1986) ("Every set of exemptions is a different maze of complexities.").

[29] Additional costs mail-order firms would face under the North Dakota Supreme Court's test include: direct payments attributable to customer error in not including use tax or including an insufficient amount; increased costs of filing tax returns with local jurisdictions that require separate filing and remittance; costs of being audited by more jurisdictions; additional credit card fees (which are assessed on the total amount, including taxes); and increased employee training and computer costs. *Id.* Legal fees for filing returns and monitoring over 6,500 jurisdictions would also rise.

bility to regulate interstate commerce exclusively to Congress, the founders were attempting to design a framework that would ensure a healthy national economy.[30] Indeed, the Court concluded its opinion in *Bellas Hess* with a virtual invitation to Congress to review its decision: "this is a domain where Congress alone has the power of regulation and control." 386 U.S. at 760. Congress is best able to determine whether "technological advances" or an increase in "volume" necessitates a change in the *Bellas Hess* test. Congress can more efficiently and fairly evaluate the "economic realities."[31] Congress is better able to weigh the competing policy interests to determine whether the "physical presence" test has lost its utility and whether a clear "economic presence" test can be crafted that would protect interstate businesses from undue "local entanglements."[32]

For example, Congress could require a *single* tax rate (which States could then apportion among their political subdivisions), thereby reducing substantially the costs

[30] THE FEDERALIST PAPERS, No. 11, at 87 (A. Hamilton) (C. Rossiter ed. 1961) ("Under a vigorous national government, the natural strength and resources of the country, directed to a common interest, would baffle all the combinations of European jealousy to restrain our growth.").

[31] Note, *supra* note 6, at 565 (arguing that congressional, rather than judicial, action is necessary because "[w]hen Congress drafts legislation on use tax collection both the mail-order industry and the state taxing agencies are represented . . .").

[32] Proponents and critics of the "physical presence" test alike have argued that Congress, not the judiciary, is better equipped to establish a workable "economic presence" test that will foster certainty and stability and permit interstate businesses to order their investments in reliance on clear principles. *See, e.g.*, Nagel, *supra* note 5, at 334 ("Ideally, the Supreme Court should not be in the business of making state tax law."); Hartman, *Collection of the Use Tax on Out-of-State Mail-Order Sales*, 39 Vand. L. Rev. 993, 1028 (1986) (arguing that Congressional action is needed because "[t]here appears to be no adequate judicial machinery to establish . . . [fair compliance] costs").

and administrative burdens of use tax collection. Congress could specify that certain businesses, or businesses with sales or solicitations below a certain level, are entirely exempt from use tax collection duties. Congress could also enact legislation that would be phased in over a period of years, thereby avoiding undue disruption and permitting businesses to adjust their investments and plans to accommodate the burdens and costs of new use tax collection responsibilities.[33]

The Court has long recognized that where business interests have relied on rules and interpretations established by the Court, "[i]f there should be a change, the Legislature can make it with infinitely less derangement of the interests of the country than would follow a new ruling of the court." *National Bank v. Whitney*, 103 U.S. at 444. This is particularly true in Commerce Clause cases, where Congress obviously has the greater competence to weigh the policy arguments for or against a new rule.

Thus, because the Court should assume that Congress will change judicial rules regulating interstate commerce if there is a need to do so, and because *stare decisis* should apply with particular force to precedents on which business has justifiably relied, the Court should not overrule *Bellas Hess*.

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[33] *Amici* take no position on whether Congress should enact legislation, and offer these examples of possible congressional action simply to illustrate why Congress is best suited to make the important policy judgments required in this area of taxation of interstate commerce.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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QUILL CORPORATION,

Petitioner,

v.

STATE OF NORTH DAKOTA,
by and through its Tax Commissioner,
HEIDI HEITKAMP,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NORTH DAKOTA

BRIEF OF *AMICI CURIAE* MAGAZINE PUBLISHERS OF AMERICA, INC., ASSOCIATION OF AMERICAN PUBLISHERS, INC., ASSOCIATION OF AMERICAN UNIVERSITY PRESSES, INC. and CLASSROOM PUBLISHERS ASSOCIATION, IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

October Term 1991

QUILL CORPORATION,

Petitioner,

v.

STATE OF NORTH DAKOTA,
by and through its Tax Commissioner,
HEIDI HEITKAMP,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

BRIEF OF *AMICI CURIAE* MAGAZINE PUBLISHERS OF AMERICA, INC., ASSOCIATION OF AMERICAN PUBLISHERS, INC., ASSOCIATION OF AMERICAN UNIVERSITY PRESSES, INC. and CLASSROOM PUBLISHERS ASSOCIATION, IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI CURIAE*

Amicus Magazine Publishers of America, Inc. (MPA) is a national trade association incorporated under the laws of the State of New York. Its members include 235 publishing firms that publish 1,193 consumer interest magazines. MPA members' publications include mass-circulation weeklies, monthly home and fashion magazines, journals of opinion, non-profit publications, and a wide variety of special interest publications. These magazines are circulated to about 100 million paid subscribers.

Amicus Association of American Publishers is the principal trade association representing book publishers in the United States. Its 230 members include publishers of popular trade and mass market books, mail order and book club publishers, publishers of educational texts and commercial and non-profit publishers of specialized professional, scientific and technical books, treatises and journals. The book publishing industry in the United States has a total sales volume of approximately $15 billion per year.

Amicus American Association of University Presses is a trade organization of 104 members, representing nationally-recognized university presses and nonprofit publishers such as the American Chemical Society and the National Academy of Sciences. The publishing activities of the 104 members focus upon a broad range of scholarly non-fictional and educational works and special interest fictional publications.

Amicus Classroom Publishers Association (CPA) is a group of publishers who produce classroom periodicals, teaching aids, kits and books, and religious school materials. These materials are utilized in public schools, parochial schools, and religious instruction classes. CPA members mail 30 million copies of classroom and religious school periodicals bi-weekly to pupils, teachers, Sunday schools, and school boards. These materials are used in social studies, religion, current affairs, civics, citizenship, language arts, science, homemaking, health, and physical education classes, and a variety of other subject areas. Over the last 50 years, approximately 18 billion copies of these materials have been distributed to students in this country.

These *amici* (Publishers) solicit and fulfill subscriptions and other sales throughout the United States, primarily through use of the Postal Service. A portion of circulation is delivered to retail outlets by common carriers. Although book publishers rely more extensively upon retail sales, a very significant pro-

portion of books — including virtually all professional, scientific and technical publications — are sold on a direct-to-consumer basis through the Postal Service and alternative delivery systems. To our knowledge, none of the *amici's* members publish any magazine, own any property, have any employees, or otherwise maintain any actual "physical presence" in North Dakota.

Should this Court adopt the "economic presence" theory proposed by the court below, or otherwise modify the rule in *Bella Hess*, publishers would be required to collect and remit (or simply pay) the North Dakota use tax on North Dakota subscriptions and sales, as well as other sales and use taxes in thousands of taxing jurisdictions throughout the United States where the publishers' sole connection is through the use of the United States Government's postal system and common carriers. This action would impose an unprecedented, unjustified, costly, and difficult burden upon them — a burden which, up to this time, this Court has found to be an unconstitutional denial of due process of law.

SUMMARY OF ARGUMENT

National Bellas Hess, Inc. v. Department of Revenue, 386 US 753 (1967) established the simple rule that a State may not tax an out-of-state enterprise whose *only* connection with the State is through use of the mails and common carriers. The rule is the essence of simplicity: its application avoids substantive analysis of a seller's activities; there is no need to weigh the seller's economic impact in the State, no counting of salesmen, no untangling of taxable and non-taxable sales. Since this Court established the rule in 1967, it has been consistently followed by this Court as well as lower Federal and State courts.

In this case, *State of North Dakota v. Quill*, 470 N.W. 2d 203 (1991), the Supreme Court of North Dakota has redefined an out-of-state enterprise's nexus, or "sufficient connection" with the State to be an "economic presence," measured solely by how often the seller advertises. North Dakota asserts that its definition is superior to this Court's long standing "physical presence" test used to determine a seller's responsibility to collect or pay taxes on interstate sales. Under North Dakota's new rule, there is "sufficient nexus" if a mailer distributes *any* form of advertising — mail, flyers, radio or TV commercials — three times in a twelve month period. The North Dakota court's decision would replace a well-established, consistently followed, clear and objective standard with an approach that inflicts draconian damage on small publishers and imposes a heavy burden of compliance on other enterprises that make interstate sales. Spread to other States, the rule could require substantive analysis to weigh "economic presence," an analysis that would undoubtedly vary according to how each State, or taxing jurisdiction within a State, chose to define "economic presence." The results would be chaotic.

There is no justification for the change. Although the figures for sales and revenues have changed as a result of the growth of the nation's economy and the expansion of direct marketing, the "exclusively interstate character" that this Court found in *Bellas Hess* remains intact. Petitioner Quill has no physical presence in North Dakota, and North Dakota provides no "services" to Quill, as that term is ordinarily understood. That test of due process, now applied as the first criterion of *Complete Auto Transit, Inc. v. Brady*, 430 US 274 (1977), should be reaffirmed unless this Court determines that states may tax all commerce that by any means crosses State lines. We believe that a fair reading of the Due Process Clause and the Commerce Clause prohibits such a result.

If the States' powers to tax interstate commerce are to be radically changed, as Quill proposes, Congress is the appropriate body to undertake the task, not the judiciary or fifty State legislatures. Exercising its broad powers under the Commerce Clause, Congress is in a far superior position to balance the multiplicity of issues and equities in this complex field. That Congress has considered but not enacted such legislation on several occasions suggests that the Federal legislature is satisfied with the results under *Bellas Hess*.

The decision below should be reversed.

ARGUMENT

I. *BELLAS HESS* SETS FORTH A CLEAR, EASILY ADMINISTERED RULE OF LAW. COMBINED WITH THIS COURT'S "FOUR-PRONG" TEST IN *COMPLETE AUTO*, IT BALANCES THE INTERESTS OF COMPENSATING STATES FOR SERVICES PROVIDED, WHILE PROTECTING FROM UNJUST TAXATION THOSE WHO RECEIVE NO SERVICES.

Bellas Hess differs from a long line of cases often described by this Court as "the perennial problem of the validity of a state tax" on interstate commerce. *Bellas Hess* presents no intricacy for analysis beyond determining whether the seller has a connection with the State beyond the use of interstate communications — the Postal Service and common carriers in *Bellas Hess* — that justifies allowing the State to tax the interstate sale. If the seller has no such connection, no "physical presence," as this Court has consistently required, the State may not require the seller to collect or pay the tax.

Bellas Hess became the first of the four-part test set forth

in *Complete Auto* to determine the validity of State taxes under the Commerce Clause. To meet *Complete Auto* requirements, a State tax must (1) be applied to an activity with a substantial nexus with the State, (2) be fairly apportioned, (3) not discriminate against interstate commerce, and (4) be fairly related to the services provided by the State. *Bellas Hess* is cited often as precedent and has served as the touchstone for comparison in several Supreme Court cases. The Court has found either "sufficient nexus" or "nexus aplenty" to distinguish *Bellas Hess*, but in each case where nexus was found, the seller maintained an actual physical presence in the State — an agent, a salesman, or an office where the tax collector could go and knock on the door.

In *Quill*, that is not possible: the seller has no presence, and derives no discernible benefit from the services that the State of North Dakota provides its citizens and business enterprises. While both Justice Fortas, writing for the dissent in *Bellas Hess*, and North Dakota, here, contend that out-of-state sellers benefit from "facilities nurtured by" the State, *Bellas Hess*, *supra*, 763, or a "trained work force," *Quill*, 31 (slip opinion), erasing State lines on the basis of such universal generalities would make both due process and Congress's exclusive power over interstate commerce virtually meaningless. It is a long way from the requirement of "physical presence" to the notion that, in our highly mobile American society, a California publisher must collect a Pennsylvania use tax from a mail-order subscriber in Philadelphia who was educated in Kansas and works in New Jersey because of the services Pennsylvania provides the *publisher*. Illinois advanced that argument in 1967, and with limitations, the dissent endorsed it. The majority did not. Instead, the majority found that such a seller's activities were "exclusively interstate in character" and drew a "bright line" to prevent unjustified state taxation of out-of-state enterprises.

The rule has been applied for almost a quarter of a century. During that time, this Court has permitted taxation where the seller has some "physical presence" in the taxing State, such as a single employee, *Standard Pressed Steel Co. v. Washington Revenue Department*, 419 US 560 (1975); a sales office, *National Geographic Society v. California Board of Equalization*, 430 US 551 (1977); or retail stores, *D.H. Holmes Co. v. McNamara*, 486 US 24 (1988).

In distinguishing *Bellas Hess*, this Court has frequently confirmed the rule. In *National Geographic*, the Court described the "sharp distinction" between the seller in *Bellas Hess* and in the Society, which maintained a sales office in California, and was therefore held responsible for the tax. The Court went further, and stated that it was not "implying acceptance" of the California Supreme Court's "slightest connection" standard of constitutional nexus; instead, the Court described the Society's sales office as "a much more substantial presence than the expression 'slightest presence' connotes." *National Geographic*, *supra*, 556.

The North Dakota court reads *National Geographic* to indicate that "a lesser showing of nexus may suffice" *Quill*, 15; it then adopts such a lesser standard, similar to the "slightest connection" California standard previously rejected by this Court. *National Geographic* suggested no such lesser standard; it requires the same constitutional standard described in *Bellas Hess* — physical presence. Bellas Hess had no office; National Geographic did.

In *Goldberg v. Sweet*, 488 US 252 (1989), the Court compared the "termination of an interstate telephone call" to the "receipt of mail" in *Bellas Hess*, and found both "insufficient nexus". *Ibid.*, 263. In *Holmes*, *supra*, this Court found "little similarity" between the activities of Holmes and National Bellas Hess. It is interesting to note, however, that in claim-

ing *Holmes* as a precedent for its new definition of nexus, the Supreme Court of North Dakota emphasized that this Court "chose to stress the economic presence" of Holmes in Louisiana. *Quill*, 16. The lower court's reading of *Holmes* is strained, if not disingenuous. In holding Holmes responsible to pay the tax, this Court listed — in the opinion's second paragraph — Holmes's extensive *physical* presence in Louisiana, including "13 department stores in various locations throughout Louisiana that employ about 5,000 workers." *Holmes, supra*, 26. Holmes's "economic presence" was not the result of mail order sales, but a statewide retail sales operation to which the mailing of catalogs was complementary.

North Dakota argues that "tremendous social, economic, commercial and legal innovations" since 1967 render *Bellas Hess* an "obsolescent precedent." While North Dakota may smart from having been "chided" by this Court for failing to detect changes in the law, *Quill*, 9, this Court's admonitions to lower courts should not be considered licenses to hunt. There is no sunset provision for this Court's interpretations of the Constitution except by Amendment or as prescribed by this Court.

This Court was fully cognizant of the size and activities of the mail order industry in 1967, and described it in detail. Mail order sales were then a significant marketing enterprise and this Court surely realized that the industry would grow. The argument was not about the *size* of the activity, but where the Due Process Clause drew the line to prohibit a State from taxing an out-of-state seller who made sales in the State. This Court made that distinction clear:

> In order to uphold the power of Illinois to impose use tax burdens. . ., we would have to repudiate totally the sharp distinction which these and other decisions have drawn between mail order sellers with

> retail outlets, solicitors, or property within a State, and those who do no more than communicate with customers in the State by mail or common carrier. . . . But this basic distinction. . . is a valid one, and we decline to obliterate it. *Bellas Hess, supra*, 758.

Today, the numbers are greater; the means of purely interstate communication are more sophisticated. Sales orders that in 1967 were mailed may now be, and commonly are, delivered by interstate telephone calls, computers, and facsimilie machines. But the principle remains the same: the seller has no physical presence in the State justifying the State's interference with interstate commerce.

The rule in *Bellas Hess* is well established, simple to apply and, for a quarter of a century, heavily relied upon by publishers and many other interstate sellers to be the law of the land. It should be reaffirmed.

II. THE RULE PROPOSED BY THE COURT BELOW WOULD CREATE MULTIPLE STANDARDS FOR DETERMINING NEXUS AMONG THE STATES, INCREASE THE COMPLEXITY OF COMPLIANCE, AND UNFAIRLY BURDEN OUT-OF-STATE PUBLISHERS.

In describing what he and Justice Rehnquist perceived to be rules "too finespun and far too gossamer", Justice Blackmun wrote:

> They fail to provide what taxpayers and the lawyers who advise them have a right to expect, namely, a firm and solid basis of differentiation between that which runs afoul of the Commerce Clause, and that which is consistent with the clause. *Colonial Pipeline Co. v. Traigle*, 421 US 100, 115 (1975).

North Dakota's new rule for determining nexus personifies this failure. In North Dakota, a seller is deemed to be engaged in "regular or systematic solicitation" of customers if he makes "three or more separate transmittances of any advertisement" during a twelve month period. § 57-40.2-01(6), N.D. Cent. Code (Supp. 1989); §81-04.1-01-03.1(3), North Dakota Administrative Code. But North Dakota makes no distinction between the seller who saturates the State with weekly mailings and the smaller enterprise whose activities are, as the dissent in *Bellas Hess* recognized without hesitation, "a necessary constitutional consequence where the sales are occasional, minor and sporadic. . . [which] should be exempt from state use tax. . . . " *Bellas Hess, supra*, 763. Although obviously riveted by that portion of the dissent that supports North Dakota's new rule, the court below ignored the dissent's insistence on equitable distinctions. Unfortunately, the dissent did not formulate the judicial methodology for making such distinctions. But clearly, without them the demand of the Due Process Clause as applied in *Complete Auto* — that taxes be fairly related to the services provided by the State — cannot be met. If the lower court's concept of nexus prevails, publishers would be required to comply with different requirements in every State, and, in many States, taxing jurisdictions within the State. Today, more than 6,000 state and local jurisdictions have sales taxing authority.

The bright line of *Bellas Hess* beckons again to avoid the administrative labyrinth of differing State requirements, rates, exemptions, and exceptions that the court below would have.

For publishers, the problem is uniquely difficult. It is a universal practice in the publishing industry to include subscription order forms and announcements of new publications inside the publications mailed to subscribers and sold at retail outlets. This long-standing practice not only encourages

renewals and new subscribers, but reduces the costs of solicitation. Publishers of literary and opinion journals that derive little revenue from advertising rely heavily on this practice to reduce circulation costs yet still reach their audience. *Commonweal*, a Catholic publication devoted to public affairs, religion, and literature, includes such cards in their bi-weekly issues sent to 18,500 subscribers, 52 of whom live in North Dakota — 28/100ths of one percent of its circulation. *National Review* encloses cards in each bi-weekly issue to 150,000 subscribers across the nation, including 255 subscribers in North Dakota. *The New Republic* encloses cards in its 105,000 weekly copies mailed to subscribers, 130 residing in North Dakota. Under North Dakota's use tax law, these publications "regularly and systematically" solicit business in the State and would be required to collect and remit the North Dakota tax.

As a matter of Federal law, book club publishers are required to announce their monthly selections to members before shipping books under a negative option plan. In many cases, these announcements are made monthly. Virtually all negative option book clubs would thus be compelled to collect and remit sales tax on any books sold in North Dakota as a result of compliance with the dictates of Federal negative option requirements. The burden that North Dakota imposes on such publishers "bears no relationship to the taxpayer's presence or activities in [the] State" and constitutes "an undue burden on interstate commerce." *Commonwealth Edison Co. v. Montana*, 453 US 609, 629 (1981).

As use taxes on out-of-state publishers spread, the burden of compliance, particularly on smaller publishers, could force smaller-circulation publishers to abandon even attempting to sell in States where few subscribers reside. Such would be the ironic and unintended "fruits of civilization for which, as Mr. Justice Holmes was found of saying, we pay taxes."

Wisconsin v. J.C. Penney, 311 US 435, 446 (1941). More relevant to this case is Holmes's observation;

> For one in my place sees how often a policy prevails with those who are not trained to national views and how often action is taken that embodies what the Commerce Clause was meant to end. *Law and the Court*, quoted in *Commonwealth Edison, supra*, 653 (Blackmun, dissenting).

III. IF THE LONG-STANDING AND WIDELY-ACCEPTED RULE IN *BELLAS HESS* IS TO BE CHANGED, IT SHOULD BE CHANGED BY CONGRESS EXERCISING ITS LEGISLATIVE POWERS UNDER THE COMMERCE CLAUSE OF THE CONSTITUTION.

A decade ago, Justice White, expressing his concern over a tax that may be 'here and now unconstitutional'', decided that ''the better part of both wisdom and valor is to respect the judgment of the other branches of the Government.'' *Commonwealth Edison, supra*, 638. We recommend that policy here.

The inequity of North Dakota's tax, encompassing practically any enterprise that might solicit any sales whatsoever is particularly odious. However, any judicial attempt to properly fashion an equitable tax on interstate sales may exceed the judiciary's proper function. This Court described the problem in *Commonwealth Edison:*

> In the first place, it is doubtful whether any legal test could adequately reflect the numerous and competing economic, geographic, demographic, social, and political considerations that must inform a decision about an acceptable rate or level of state taxation,

> and yet be reasonably capable of application in a wide variety of individual cases. 453 US 609, 628.

In the second place, Congress is the appropriate branch of the Federal government to consider and develop the solution to State taxes on interstate transactions. More than 30 years ago, following this Court's decisions in *Northwestern States Portland Cement v. Minnesota*, 358 US 450 (1959), Congress, concerned about inequitable results from multiple taxation of the same transaction, enacted Public Law 86-272, 77 STAT. 355. Congress's concerns in that instance were similar to the concerns expressed by sellers in this case: the lack of ''sufficient nexus,'' the heavy cost of compliance with a multitude of rules and regulations in thousands of taxing jurisdictions, and the probability that the ''economic implications for the economy of the entire Nation may be unfortunate.'' Senate Report 658, 86th Congress, p. 3 (1959).

Congress has held hearings and given consideration to legislation designed to permit State taxation of interstate sales, but has yet to propose a solution or disturb this Court's ''bright line'' drawn in *Bellas Hess*. The *amici* of this brief participated in those hearings. Congress's decision to consider the issue further, despite the urging of many State officials for immediate action, suggests that Congress perceives the problem to be far more complex than does, for instance, North Dakota. Until Congress exercises its legislative powers to change the limits of State authority in relation to interstate commerce, *Bellas Hess* should remain undisturbed.

CONCLUSION

Quill is an unusual case in which a State court has usurped the powers of the United States Supreme Court to overturn a well-settled rule of law. This despite the fact that the lower court itself claimed ''sufficient nexus'' — if it rises to that — in

Quill's ownership of computer software used by some of its customers to place orders — a tangible piece of property, perhaps not too thin a reed to support a demand that taxes be collected.

Underlying the lower court's decision, however is the grossly inequitable State statute upon which the decision was based, a statute that requires any seller to collect or pay taxes based on even the most incidental advertising within the States' border, and regardless of the volume of sales. Such a burden upon commercial activity denies due process of law and impermissibly invades Congress's exclusive powers over interstate commerce. We urge that this Honorable Court reverse the decision.

Respectfully submitted

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IN THE

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OCTOBER TERM, 1991

QUILL CORPORATION,

Petitioner,

v.

STATE OF NORTH DAKOTA
BY AND THROUGH ITS TAX COMMISSIONER,
HEIDI HEITKAMP,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of North Dakota

BRIEF OF AMICI CURIAE ARIZONA MAIL ORDER COMPANY, INC., BASS PRO SHOPS, INC., BLOOMINGDALE'S BY MAIL LTD., THE BRADFORD EXCHANGE, LTD., CABELA'S, INC., CURRENT, INC., DOUBLEDAY BOOK & MUSIC CLUBS, INC., FINGERHUT COMPANIES, INC., HANOVER DIRECT INC., HARRY AND DAVID, LILLIAN VERNON CORPORATION, MBI, INC., NEW HAMPTON, INC., THE NEIMAN MARCUS GROUP, INC., PUBLISHERS CLEARING HOUSE, RODALE PRESS, INC., SFA FOLIO COLLECTIONS, INC., AND USAA BUYING SERVICES, INC. IN SUPPORT OF THE PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-194

QUILL CORPORATION,

Petitioner,

v.

STATE OF NORTH DAKOTA
BY AND THROUGH ITS TAX COMMISSIONER,
HEIDI HEITKAMP,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of North Dakota

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BRIEF OF AMICI CURIAE ARIZONA MAIL ORDER COMPANY, INC., BASS PRO SHOPS, INC., BLOOMINGDALE'S BY MAIL LTD., THE BRADFORD EXCHANGE, LTD., CABELA'S, INC., CURRENT, INC., DOUBLEDAY BOOK & MUSIC CLUBS, INC., FINGERHUT COMPANIES, INC., HANOVER DIRECT INC., HARRY AND DAVID, LILLIAN VERNON CORPORATION, MBI, INC., NEW HAMPTON, INC., THE NEIMAN MARCUS GROUP, INC., PUBLISHERS CLEARING HOUSE, RODALE PRESS, INC., SFA FOLIO COLLECTIONS, INC., AND USAA BUYING SERVICES, INC. IN SUPPORT OF THE PETITIONER

STATEMENT OF INTEREST [1]

Amici are large mail order companies that conduct their business in interstate commerce.[2] Despite differ-

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[1] Counsel for all parties have consented to the filing of this amicus brief. *Amici* have filed those consents with the Clerk of this Court.

[2] Appendix A briefly describes the interest of each individual *amicus*.

ences in product line and customer base, these *amici* share certain characteristics: they each solicit orders from customers throughout the United States by mail, receive orders, generally fill them from a central fulfillment center, and ship those orders by mail or common carrier. In states where they have a physical presence and hence nexus with the taxing state, these *amici* have recognized their obligation to collect use tax from their mail order customers and remit that tax to state authorities. However, in those states where they have not had physical presence, they have generally not collected use tax, relying on this Court's long-standing decision in *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967).

These *amici* could face staggering potential retroactive tax liability if this Court were to overturn *Bellas Hess* and allow states to force mail order companies to remit use tax for past periods based on nexus less substantial than physical presence. The burden of this retroactive tax liability would fall directly on these companies, since once a mail order transaction has been completed, it is virtually impossible for the company to collect the use tax from the customer.

Amici estimate that their potential retroactive tax liability is in the millions of dollars for each company and that the potential retroactive tax liability of mail order companies throughout the United States is in the billions of dollars. These *amici* believe that the imposition of such retroactive tax liability would be both unfair and inconsistent with principles of orderly judicial decision-making. While they urge that *Bellas Hess* was correctly decided and should be reaffirmed on that ground, they also urge that, even if this Court would reach a different result as an original matter today, principles of *stare decisis* should in and of themselves lead this Court to adhere to *Bellas Hess*.

INTRODUCTION AND SUMMARY

This Court has repeatedly recognized that a state cannot impose tax obligations on an out-of-state business unless the business has a "substantial nexus" with the taxing state. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). For nearly a quarter of a century, this Court's leading decision defining the required nexus in the context of interstate mail order sales has been *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967). There, this Court ruled that states cannot impose use tax collection and payment obligations on out-of-state mail order companies having no physical presence within the state.

The Court noted that the requirement that a company be physically present (*i.e.*, have "retail outlets, solicitors, or property" within the taxing state) before being subject to use tax obligations was a "basic distinction" which had been "generally recognized by the state taxing authorities." *Bellas Hess*, 386 U.S. at 758. The Court applied this bright line rule to mail order companies, declining to adopt an alternative which would have based states' ability to impose use tax collection obligations on an uncertain assessment of whether a mail order company "regularly and continuously engage[s] in 'exploitation of the consumer market'" in the state. *Id.* at 762 (Fortas, J., dissenting). The Court found that, without this bright line distinction, mail order companies would be subject to "a virtual welter of complicated obligations to local jurisdictions," which would impose "unjustifiable local entanglements" on interstate commerce. *Id.* at 759-60. The Court left it to Congress to fashion legislation which would address the "unjustifiable local entanglements" that inconsistent state use tax laws would have imposed on interstate commerce, noting, "Under the Constitution, this is a domain where Congress alone has the power of regulation and control." *Id.* at 760.

Amici urge that *Bellas Hess* was sound when decided and that its analysis of use tax collection and payment

burdens continues to be accurate today. The burdens on interstate companies of inconsistent regulation have actually increased, rather than decreased, with time, and technological advances in the mail order industry have not alleviated these burdens. Nor has the industry changed in any constitutionally significant manner since this Court's *Bellas Hess* decision. *Bellas Hess* continues to be especially important because it protects interstate commerce from the discrimination which would inevitably flow from imposing significantly greater collection costs on interstate companies than on their intrastate competitors. However, since petitioners and other parties will address those issues, this brief will focus on why principles of *stare decisis* require that the Court adhere to *Bellas Hess* whether or not as an original matter it would decide *Bellas Hess* today the same way that it did in 1967.

A party seeking to have this Court overrule one of its decisions must provide "special justification." *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984).[3] In determining whether to adhere to past decisions, this Court has examined a variety of considerations, including whether the earlier decision was based on incomplete analysis;[4] whether the law, factual context, or policies underlying the decision have changed since the precedent was de-

[3] "[I]t is indisputable that *stare decisis* is a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon 'an arbitrary discretion.'" *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989), *quoting* The Federalist, No. 78, p. 490 (H. Lodge ed. 1888) (A. Hamilton); *see also Payne v. Tennessee*, 111 S.Ct. 2597, 2609 (1991); *Welch v. Texas Dep't of Highways and Public Transportation*, 483 U.S. 468, 494 (1987) ("the doctrine of *stare decisis* is of fundamental importance to the rule of law").

[4] *See, e.g., Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 766 (1984).

cided;[5] whether the precedent provides a workable standard;[6] and whether overruling the precedent would frustrate legitimate reliance interests.[7] These considerations support continued adherence to *Bellas Hess*. The *Bellas Hess* case was thoroughly briefed, based on contemporaneous Congressional hearings which had fully addressed the use tax collection issue.[8] Neither the law nor the factual context has changed since *Bellas Hess*: this Court has continued to demand that states demonstrate a substantial nexus between themselves and the business they seek to tax. *See infra* pp. 7-9. Furthermore, it is indisputable that the "bright line" rule of physical presence articulated in *Bellas Hess* provides a far more workable standard for judging states' ability to impose use tax collection obligations than any other alternative measure of nexus.[9]

This brief, however, focuses on the fourth *stare decisis* factor: reliance interests. As this Court noted last Term, "considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved . . . ." *Payne v. Tennessee*,

[5] *See, e.g., Goodman v. Lukens Steel Co.*, 482 U.S. 656, 659-62 (1987); *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989).

[6] *See, e.g., Swift & Co. v. Wickham*, 382 U.S. 111, 124-25 (1965).

[7] *See, e.g., Monell v. Dep't of Social Services*, 436 U.S. 658, 700 (1978).

[8] *See Bellas Hess*, 386 U.S. at 758-59 n.11 (citing H.R. Rep. No. 565, *Report of the Subcomm. on State Taxation of Interstate Commerce*, 89th Cong., 1st Sess. (1965)); *see also id.* at 760 n.15 (referencing H.R. Rep. No. 2013, 89th Cong., 2d Sess. (1966)).

[9] The protean test applied by the court below, copied substantially from the subjective "economic presence" test rejected in *Bellas Hess* (*see Bellas Hess*, 386 U.S. at 762; *Quill*, Pet. App. A5-A9), is of little use in adjudication and essentially *no* use to businesses seeking to plan their affairs with certainty. The North Dakota court as much as admitted this, noting its test was a "more case-specific" approach. *Quill*, Pet. App. A7.

111 S.Ct. at 2610.[10] For nearly a quarter of a century, *amici* and others have reasonably relied on *Bellas Hess*: they have collected use tax when they have been physically present in a state, and generally have not collected it when they are not. Nothing has indicated that mail order companies should question their reliance on the physical presence test as articulated in *Bellas Hess*. For the past 24 years, this Court has acknowledged and applied *Bellas Hess* as controlling law. The state supreme courts, with the exception of the decision below, have uniformly recognized its continuing validity, and Congress has refused to legislatively "overrule" the precedent.

If *Bellas Hess* were now overruled, mail order companies could face potential retroactive tax liabilities totalling billions of dollars. *See infra* pp. 11-20. None of this retroactive liability could be recovered from the customers originally liable for the tax. The Court should not sanction such fundamental unfairness, especially when Congress has the authority and ability to fashion forward-looking legislation that would enable the states to utilize out-of-state companies to collect use tax, reduce the burdens now associated with such collection efforts by a uniform national approach, and avoid the imposition of unfair, retroactive tax liability.

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[10] The core of *stare decisis* is that the principle furthers "the stability and predictability required for the ordering of human affairs over the course of time." *Williams v. Florida*, 399 U.S. 78, 127 (1970) (Harlan, J., concurring in part and dissenting in part). *Stare decisis* ensures that "the law will not merely change erratically," and "permits society to presume that bedrock principles are founded in the law rather than in the proclivity of individuals." *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986). It "embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations." *Helvering v. Hallock*, 309 U.S. 106, 119 (1940).

ARGUMENT

THIS COURT SHOULD REAFFIRM ITS DECISION IN *NATIONAL BELLAS HESS, INC. v. DEPARTMENT OF REVENUE*, 386 U.S. 753 (1967)

I. MAIL ORDER COMPANIES HAVE JUSTIFIABLY RELIED ON *BELLAS HESS* FOR NEARLY TWENTY-FIVE YEARS

This Court's 1967 decision in *Bellas Hess* did not break new ground; to the contrary, *Bellas Hess* was clearly foreshadowed by the Court's prior decisions in the use tax area. In each of the use tax decisions leading up to *Bellas Hess*, this Court based its finding of nexus upon physical presence.[11] Thus, when *Bellas Hess* announced that a mail order company with no physical presence in the State could not be forced to collect use taxes, the case was no anomaly.

However, the North Dakota Supreme Court here concluded that since 1967 "the foundational basis of *Bellas Hess* has been eroded . . ." because a "striking shift" in this Court's jurisprudence occurred in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). *See Quill*, Pet. App. A13. But *Complete Auto*, in announcing a new four-part test for invalidating state tax laws under the Commerce Clause (U.S. Const. art. I, § 8, cl. 3), did not question *Bellas Hess*. It continued to require a "substantial nexus" between the state and the company the state wants to tax. *Complete Auto*, 430 U.S. at 279.

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[11] *See Felt & Tarrant Mfg. Co. v. Gallagher*, 306 U.S. 62 (1939) (presence of the company's agents and subagents in the state); *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359 (1941) and *Nelson v. Montgomery Ward & Co.*, 312 U.S. 373 (1941) (maintenance of local retail stores, local advertising, and performance of business related to mail order sales); *General Trading Co. v. Tax Comm'n*, 322 U.S. 335 (1944) (retailer sent a sales force into the jurisdiction); *Miller Bros. v. Maryland*, 347 U.S. 340 (1954) (where there was regular and continuous solicitation, but no local stores or local agents, the State has *not* established use tax nexus and may not force collection of the tax); *Scripto v. Carson*, 362 U.S. 207 (1960) (presence of ten of the company's wholesalers in the state).

And since *Complete Auto*, this Court has repeatedly reaffirmed its adherence to *Bellas Hess*.

For example, in *National Geographic Society v. California Bd. of Equalization*, 430 U.S. 551 (1977), decided less than a month after *Complete Auto*, the Court applied the "bright line" substantial nexus rule of *Bellas Hess* and rejected a claim that a company's "slightest presence" in the state was sufficient. *Id.* at 556. In doing so the Court reaffirmed *Bellas Hess*' "careful[] underscor[ing of] . . . the 'sharp distinction . . . between mail order sellers with retail outlets, solicitors, or property within [the taxing] State, and those [like the company in *Bellas Hess*] who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business.'" *Id.* at 559 (quoting from *Bellas Hess*, 386 U.S. at 758). Four years later, in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981), the Court clarified that *Bellas Hess* is the touchstone of the first prong of the *Complete Auto* test,[12] and in each of the last three years this Court has referred to *Bellas Hess* with approval.[13] Before this Court's grant of certiorari in this

[12] "Under this threshold test, the interstate business must have a substantial nexus with the State before *any* tax may be levied on it. *See National Bellas Hess, Inc. v. Illinois Revenue Dep't*, 386 U.S. 753 (1967)." *Commonwealth Edison*, 453 U.S. at 626 (emphasis in original).

[13] *See D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 33 (1988) ("In *National Bellas Hess*, we held that the State of Illinois could not, consistently with the Commerce Clause, compel an out-of-state mail order company to collect a use tax on purchases of goods by Illinois residents when the seller's only connection with its Illinois customers was by mail or common carrier"); *Goldberg v. Sweet*, 488 U.S. 252, 263 (1989) (Court noted that *Bellas Hess* is benchmark of substantial nexus: "We also doubt that termination of an interstate telephone call, by itself, provides a substantial enough nexus for a State to tax a call. *See National Bellas Hess, Inc. v. Department of Revenue of Illinois*, 386 U.S. 753 (1967) (receipt of mail provides insufficient nexus)"); *Jimmy Swaggart Ministries v. Bd. of Equalization*, 110 S.Ct. 688, 699-700 (1990) (*Bellas Hess* and *National Geographic* control issue of substantial nexus).

case, it had previously declined two invitations to revisit its *Bellas Hess* precedent within the last year.[14] And, before this case, no opinion of any Justice had expressed disagreement with *Bellas Hess*.

With the exception of the decision below, state appellate and supreme courts have reinforced mail order companies' reasonable reliance on *Bellas Hess* by repeatedly recognizing the precedent's control of the use tax nexus issue.[15]

[14] *See SFA Folio Collections, Inc. v. Bannon*, 585 A.2d 666 (Conn.), *cert. denied sub nom. Commissioner of Revenue Services v. SFA Folio Collections, Inc.*, 111 S.Ct. 2839 (1991); *Cally Curtis Co. v. Groppo*, 572 A.2d 302 (Conn.), *cert. denied*, 111 S.Ct. 77 (1990).

[15] *See, e.g., SFA Folio Collections, supra* n. 14; *Cally Curtis, supra* n. 14; *Bloomingdale's By Mail, Ltd. v. Dep't of Revenue*, 591 A.2d 1047 (Pa. 1991), *aff'g* 567 A.2d 773 (Pa. Commw. Ct. 1989), *cert. filed*, No. 91-383 (Sept. 3, 1991); *Pearle Health Services, Inc. v. Taylor*, 799 S.W.2d 655, 658 (Tenn. 1990); *Alaska Airlines, Inc. v. Dep't of Revenue*, 769 P.2d 193, 198 (Or. 1989), *cert. denied*, 110 S.Ct. 717 (1990); *Burke & Sons Oil Co. v. Director of Revenue*, 757 S.W.2d 278, 280 (Mo. App. 1988); *Good's Furniture House, Inc. v. Iowa State Bd. of Tax Review*, 382 N.W.2d 145, 150 (Iowa), *cert. denied*, 479 U.S. 817 (1986); *Avco Financial Serv. Consumer Discount Co. One, Inc. v. Director Div. of Taxation*, 494 A.2d 788, 795 (N.J. 1985); *Illinois Commercial Men's Ass'n v. State Bd. of Equalization*, 671 P.2d 349, 355 (Cal. 1983), *app. dism'd*, 466 U.S. 933 (1984); *Boswell v. Paramount Television Sales, Inc.*, 282 So. 2d 892, 897 (Ala. 1973); *Book-of-the-Month Club, Inc. v. Porterfield*, 268 N.E.2d 272, 274 (Ohio 1971). Apart from the decision below, the only other decisions questioning *Bellas Hess* have been two lower court decisions in Tennessee, neither of which is final. *See SFA Folio Collections, Inc. v. Huddleston*, No. 89-3015-III (Davidson Cty. Chancery Ct. Tenn. March 11, 1991) and *Bloomingdale's By Mail Ltd. v. Huddleston*, No. 89-3017-II (Davidson Cty. Chancery Ct. Tenn. March 8, 1991). The ruling in the *By Mail* case is on appeal to the Tennessee Supreme Court, and that court is holding the case pending the outcome of this case. *See Bloomingdale's By Mail Ltd. v. Huddleston*, No. 01-S-01-9106-CH-00047, Order of October 28, 1991 (per curiam). The *Folio* case has been placed on inactive status pending the *By Mail* appeal. As noted above, in 1990 the Tennessee Supreme Court in *Pearle* recognized the continued vitality of *Bellas Hess*.

Two of these decisions have been rendered in the last eight months,[16] and just four months ago, a federal district court enjoined California's attempt to impose use tax collection obligations on direct marketing companies with no physical presence in that State.[17]

Even the North Dakota Supreme Court's decision in this case refusing to follow *Bellas Hess* could not be said to provide notice of any impending change in the governing constitutional law. Under the Supremacy Clause, this Court's decisions bind the lower courts, as well as state executive officers and legislators.[18] Similarly, the fact that some states have changed their use tax statutes to base nexus on mere catalog solicitation does not suggest that mail order companies should no longer follow *Bellas Hess*. Enforcing such statutes while *Bellas Hess* still controls the issue of use tax nexus is simply unconstitutional.

Continued reliance on *Bellas Hess* has also been justified by Congress's consistent refusal to overrule that precedent. For many years states have lobbied for legislative overruling, and in recent years numerous bills have been introduced to achieve legislatively the goal that North Dakota seeks before this Court.[19] But Congress has not

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[16] *See supra* n. 15.

[17] *Direct Marketing v. Bennett*, No. Civ. S-88-1067 (E.D. Cal. July 12, 1991 (1991 U.S. Dist. LEXIS 10736) (notice of appeal filed 9th Cir. July 16, 1991).

[18] *Cooper v. Aaron*, 358 U.S. 1, 18 (1958); *see also, e.g., Chesapeake & Ohio Ry. v. Martin*, 283 U.S. 209, 221 (1931).

[19] *See, e.g.*, S. 2368, 100th Cong., 2d Sess. (1988); H.R. 3521, 100th Cong., 1st Sess. (1987); H.R. 1891, 100th Cong., 1st Sess. (1987). Hearings have been conducted on a number of legislative proposals. *See, e.g., State Taxation of Interstate Commerce: Hearing on S. 1510 Before the Subcomm. on Taxation and Debt Management of the Senate Comm. on Finance*, 99th Cong., 1st Sess. (1985); *Interstate Sales Tax Collection Act of 1987: Hearing on H.R. 1242 Before the Subcomm. on Select Revenue Measures of the House Comm. on Ways and Means*, 100th Cong., 1st Sess. (1987); *Collection of State Sales and Use Taxes by Out-of-State Vendors:*

taken any action, conveying to all parties—state taxing authorities and mail order companies alike—the continuing vitality of *Bellas Hess*.

Thus, mail order companies have reasonably concluded that *Bellas Hess* continues to govern the issue of use tax nexus.

II. BECAUSE MAIL ORDER COMPANIES HAVE ORDERED THEIR AFFAIRS IN RELIANCE ON *BELLAS HESS*, OVERRULING THAT DECISION COULD IMPOSE POTENTIALLY MASSIVE RETROACTIVE LIABILITY ON THOSE COMPANIES

If *Bellas Hess* were overruled, mail order companies would be threatened with liability for uncollected taxes (plus accrued interest and sizeable penalties) in the thirty-eight states that currently define nexus by referring to catalog distribution or other forms of advertising. Of those thirty-eight states, twenty have had such "catalog nexus" provisions in effect in some form for decades, many dating back to the 1940's and 1950's. *See* Appendix B. In 1966, for example, New Jersey amended its definition of a "vendor" subject to use tax collection obligations to include any "person who solicits business . . . by distribution of catalogs and other advertising matter . . . ."[20] Such statutes were in effect when this Court decided *Bellas Hess* in 1967 and appear to include all mail order sales within their scope, inasmuch as they are specifically drafted to make catalog solicitations a sufficient nexus.

Hearing on S. 639 and S. 1099 Before the Subcomm. on Taxation and Debt Management of the Senate Comm. on Finance, 100th Cong., 1st Sess. (1987).

[20] N.J. Stat. § 54:32B-2(i)(2)(c) (1966).

Nevertheless, even before *Bellas Hess*, most states refused to enforce existing catalog nexus provisions against out-of-state sellers engaged solely in disseminating catalogs and shipping goods into the state by mail or common carrier.[21] This position stemmed from prevailing "uncertainty as to the constitutional limits of the State's authority," [22] an uncertainty well founded on this Court's jurisprudence. *See supra* p. 7.

Bellas Hess resolved any uncertainty and rendered the existing catalog nexus statutes unenforceable against interstate mail order sellers. Between 1967 and 1986, state taxing authorities generally abided by *Bellas Hess* and did not attempt to impose use tax collection and payment obligations on mail order sellers with no physical presence in the state, even though such sellers fell within many statutory definitions of nexus.[23]

Although there has been no change in this Court's jurisprudence, this policy of nonenforcement began to erode in 1986, when some states abandoned their longstanding practice of administrative forbearance and aggressively sought to enforce their catalog nexus statutes against

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[21] Brief for Appellant at 13, *Bellas Hess*, 386 U.S. 753 (O.T. 1966, No. 241) (stating that the states with catalog nexus provisions "have rarely attempted to enforce the obligation"); *see also Bellas Hess*, 386 U.S. at 758 n.11 (citing Congressional testimony).

The one state court that specifically considered the issue prior to *Bellas Hess* construed its statute to avoid invalidation on Federal constitutional grounds, and found that Alabama's statute did not apply to purely interstate mail order sellers. *Alabama v. Lane Bryant, Inc.*, 171 So. 2d 91 (Ala. 1965).

[22] H.R. Rep. 565, *Report of the Subcomm. on State Taxation of Interstate Commerce*, 89th Cong., 1st Sess. at 627, 633 (1965).

[23] In one instance where tax authorities attempted to seek such obligations, they were rebuffed. *See Book-of-the-Month Club, supra* n. 15.

traditional mail order sellers.[24] For example, in Pennsylvania, the Department of Revenue attempted to enforce the State's old catalog nexus statute against an out-of-state mail order seller. The Pennsylvania statute, effective since 1959, imposed use tax obligations on sellers "maintaining a place of business" in the Commonwealth, defined to include those sellers which are "[r]egularly or substantially soliciting orders within [Pennsylvania] by means of catalogues or other advertising . . . ." Section 201(b)(3) of the Tax Reform Code of 1971, Pa. Stat. Ann. tit. 72 § 7201(b)(3) (Purdon 1990). The Department argued that "a mail-order seller . . . falls within the ambit of Section 201(b)(3)." *See L.L. Bean, Inc. v. Commonwealth Dept. of Revenue*, 516 A.2d 820 (Pa. Commw. Ct. 1986). Similarly, after 20 years of complying with *Bellas Hess*, Tennessee recently adopted a new tax policy that challenges prevailing constitutional limitations,[25] relying on its new interpretation of pre-existing Tennessee law,[26] which required a company to collect use taxes if it "[d]istributes catalogues or other advertising matter and by reason thereof receives and accepts orders from residents of [the] State." [27]

If this Court were to alter its prior constitutional interpretation, any state with a catalog nexus provision

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[24] *See* Douglas, *State Officials Determined to Tax Interstate Mail Order Sales*, 47 Tax Notes 1048 (1990) (citing fiscal constraints and frustration with the decision of Congress not to overrule *Bellas Hess* as major factors in states' new attempts to impose use tax obligations).

[25] *See* Letter from Jim McLeod, Chief of Field Audit, Sales and Use Tax Division, Tennessee Dep't of Revenue, to Bloomingdale's By Mail (Aug. 10, 1989). Representative letters have been lodged with the Clerk of the Court for the convenience of the Court.

[26] Tenn. Code Ann. § 67-6-102(4)(J) (1983) (later renumbered -102(6)(J)).

[27] For a portion of the assessment period the State also relied on a recent amendment to the Tennessee use tax provisions which further expanded their scope. *See* letter *supra* n.25.

could change its entrenched policy of nonenforcement and adopt this new construction. The overwhelming number of states have never judicially construed their catalog nexus provisions in this context. In all but one of the states where the judiciary has addressed the question, the only barrier to the reinterpretation of most existing laws to cover mail order sales is this Court's decision in *Bellas Hess*; thus, nineteen states would be free to interpret their longstanding statutes so as to reach mail order sellers.[28]

The jeopardy to mail order sellers arises not only from the reinterpretation of existing law. In recent years many states have supplemented existing catalog nexus statutes with new statutes that directly contradict *Bellas Hess*. "Since 1987, a movement has quietly developed among the states to challenge industry interpretations of the scope and applicability of *Bellas Hess* through the passage of state legislation." [29] At least thirty-five states

[28] *See Bloomingdale's By Mail Ltd. v. Dep't of Revenue, supra* n. 15; *SFA Folio Collections, supra* n. 14; *Book-of-the-Month Club, supra* n.15; *but see Lane Bryant, supra* n.21 (Alabama's catalog nexus provision already construed not to apply to interstate mail order sellers).

The determination of states to extend their jurisdiction to the maximum possible constitutional limits is often expressed in the legislation itself. *See, e.g.*, N.Y. Tax Law § 1101(b)(8) (McKinney 1991) ("regular or systematic" solicitation by mail creates liability if such solicitation "satisfies the nexus requirement of the United States Constitution"); W. Va. Code § 11-15A-6a (Supp. 1990) ("substantial and recurring" solicitation by mail creates liability if seller has physical presence or "any other presence that provides the necessary minimum contacts for a constitutionally sufficient nexus"); *see also* Ga. Code Ann. § 48-8-1 (Michie 1982) (it is the intention of Georgia to "exercise its full and complete power to tax" retail sales and uses of tangible personal property "except to the extent prohibited by the constitutions of the United States and of [Georgia]").

[29] A. Morse & C. Zimmerman, *Efforts to Collect Sales Tax on Interstate Mail Order Sales: Recent State Legislation* 1 (National Conference of State Legislatures: June 1990).

(17 of which already had catalog nexus statutes), including North Dakota, have passed laws which purport to create use tax obligations for interstate sellers that are not physically present in the state, but which solicit sales by mailing catalogs to residents there. *See* Appendix C. Although specific state formulations vary, every state which has passed an "anti-*Bellas Hess*" statute in essence adopts the "economic nexus" test expressed by Justice Fortas in his *Bellas Hess* dissent.[30] Some impose use tax collection duties on sellers who engage in "regular or systematic" solicitation by mail, catalog or other interstate means, while others refer to "substantial and recurring" solicitation or "purposeful or systematic exploitation" of the marketplace. *See* Appendix C. In whatever language used, each of these new statutes ignores *Bellas Hess* by directly defying its prohibition against traditional mail order taxation. For example, in broadening Connecticut's statute to include "engaging in regular or systematic sales of tangible personal property in this State . . . by the distribution of catalogs," [31] legislators observed that the amendment "flies in the face of a Supreme Court case" and "would not comply with the requirements in . . . *Bellas Hess*." [32]

Some of the states with newly enacted legislation have aggressively sought to enforce their purportedly expanded taxing powers by targeting mail order companies, re-

[30] *See* White, *Emerging State Use Tax Collection Legislation and the Out-of-State Mail Order Vendor: One Constitutional Step Beyond Scripto and National Bellas Hess*, 42 Fla. L. Rev. 775, 778 (1990).

[31] Conn. Gen. Stats. Ann. § 12-407(12), (15) (West Supp. 1991).

[32] *See* Connecticut House of Representatives, Hearings on SB702 at 2647, 2618 (April 5, 1989); *see also* Nebraska Attorney General Opinion No. 87020 (Feb. 17, 1987) ("[W]e believe certain aspects of the [Nebraska anti-*Bellas Hess*] amendment pose serious constitutional difficulties under the standards enunciated by the Supreme Court").

questing that they register and begin collecting tax, and issuing assessments against those who rely on *Bellas Hess* and refuse to comply.[33] In California alone, state taxing officials issued assessments against more than 200 mail order companies in the months following passage of California's statute. DM News, August 1, 1989, at 1. Representatives from the Florida Department of Revenue in enforcement letters to out-of-state mail order sellers have stated that *Bellas Hess* "is contrary to the current official position of this Department . . . ."[34] These enforcement efforts have prompted litigation to challenge the new statutes in at least five states in addition to North Dakota.[35]

It is equally clear that states such as North Dakota intend to assess taxes retroactively.[36] In only a few states

[33] *See* State Enforcement Letters (lodged with the Court); Tennessee Tax Quarterly, Department of Revenue, Vol. 8, No. 3, July-Sept. 1988), *reprinted in* Tenn. Tax Rep. (CCH) ¶ 400-162 at 22,276 (1988) ("Tennessee plans a very aggressive program to ensure compliance. An effort to notify probable dealers of their responsibility is a part of the program . . . . Dealers who fail to comply voluntarily may be audited and held liable for any uncollected taxes plus applicable penalties and interest dating to the law's enactment date").

[34] Letter from J. William Norman, Technical Assistant, Florida Department of Revenue, to Laura A. Kulwicki (Feb. 7, 1990); *see also* Letter from Joanne Limbach, Ohio Tax Commissioner, to Daniel T. White (Apr. 24, 1990), quoted in White, *Emerging State Use Tax Collection Legislation, supra* n.30 at 791 n.111.

[35] *See Bennett, supra* n.17; *SFA Folio Collections, Inc. v. Tracy*, No. 91-295 (Ohio Bd. of Tax Appeals, appeal filed March 8, 1991), appeal from *SFA Folio Collections*, No. 910002000 (Ohio Tax Comm'r, Feb. 8, 1991); *Renovator's Supply, Inc. v. Sharp*, No. 91-9493 (Tex. Dist. Ct., filed July 5, 1991); *see also supra* n.15 (Tennessee litigation). State attempts to impose obligations contrary to *Bellas Hess* continue even in states such as Connecticut, where the state supreme court has continued to follow *Bellas Hess*. *See, e.g., The Neiman Marcus Group, Inc. v. Meehan*, No. 387601 (Conn. Super. Ct., appeal filed Dec. 10, 1990).

[36] *See supra* n.35 (proceedings pending in Tennessee, Pennsylvania, California, Ohio, Texas, and Connecticut). Idaho's notification letter to mail order sellers informs them that if "court decisions support Idaho's law, businesses that have not collected and remitted sales/use tax may be faced with a retroactive tax liability." Letter from Jim Jennison, Idaho Tax Discovery Officer, to SFA Folio Collections, Inc. (May 8, 1990). South Carolina similarly asserts that "[a]ny nonresident retailer . . . who has the requisite 'nexus' with South Carolina, may be held accountable for all use tax due and owed the State, for all periods open under the statute." S.C. Information Letter #89-15 (June 13, 1989). Florida officials assert that "future decisions affirming state power in this area could result in substantial liability for taxes that should have been collected over a number of years in the past." Letter from J. William Norman, Technical Assistant, Florida Dept. of Revenue, to Laura A. Kulwicki (Jan. 31, 1990).

have the statutes been written to protect against retroactive liability; thus, reinterpretation and enforcement of old catalog nexus statutes, coupled with enforcement of new anti-*Bellas Hess* legislation, would likely create enormous retroactive tax consequences for mail order sellers if *Bellas Hess* were overruled.[37] This is so because most

[37] So far as we are aware, no state has expressly disclaimed retroactive liability, but in a few states the statute bars enforcement until a change in this Court's jurisprudence or the passage of federal legislation. *See, e.g.*, Colo. Rev. Stat. § 39-26-301 *et seq.* (Supp. 1991) (creating use tax liabilities for out-of-state sellers, but only after "passage of federal legislation authorizing states to require out-of-state retailers to collect sales or use taxes"); La. Stat. Ann. § 47-305E (West Supp. 1990) (liability arises for sales promoted through catalogs "and for which federal legislation or federal jurisprudence enables taxation"); Massachusetts Department of Revenue Technical Information Release No. 1988-13 (December 8, 1988) (the "clear legislative intent" behind enactment of the statute "was that the expanded Massachusetts jurisdiction would not be exercised until federal statutory or case law specifically authorizes each state to require foreign mail order vendors to collect sales and use taxes on goods delivered to that state"). It is unclear whether the Louisiana and Massachusetts statutes would be interpreted as barring retroactive liability once *Bellas Hess* were overruled. In Colorado the new statute was conditioned on the passage of federal legislation, but an earlier unqualified statute remains on the books. Colo. Rev. Stat. § 39-26-102(3)(6) (Supp. 1991). In view of this lack of clarity, we have excluded these three states in computing retroactive liability in Appendices E & F.

states possess virtually unlimited authority in assessing back taxes.[38] As a result, mail order sellers could face exposure for uncollected taxes on sales dating back to the effective date of each state's catalog nexus statute, which in some instances is theoretically more than forty years [39] and includes virtually all past sales made by many mail order companies.

The resulting economic burden can be quantified by referring to estimates of "lost" tax revenues attributable to mail order sales protected by *Bellas Hess*. Recent estimates of revenue loss range from $694 million to $3 billion per year.[40]

The economic consequences of states' express attempts to enforce old catalog nexus statutes in a manner directly inconsistent with *Bellas Hess* would threaten the economic health—if not the very existence—of many mail order companies. Even limiting liability to uncollected taxes on sales made since 1985 (*see infra* n. 42), and using the revenue estimates provided by the Advisory

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[38] Of the 44 states and the District of Columbia that currently impose sales and use taxes, 35 states do not impose any period of limitations on assessments when no return is filed. The remaining ten jurisdictions permit the taxing authorities to assess taxes for past periods ranging from three to eight years. *See* Appendix D.

[39] *See* Appendix B.

[40] *Interstate Sales Tax Collection Act of 1987 and the Equity in Interstate Competition Act of 1987: Hearings on H.R. 1242, H.R. 1891, and H.R. 3521 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 100th Cong., 2d Sess. at 95 (1988) (testimony of Direct Marketing Association) (citing 1986 study by Robert R. Nathan Associates, Inc., *An Economic Study of the Likely Impact of Overturning the Bellas Hess Decision on State Tax Revenues* (1986) (estimating a $694 million annual loss)); *Cf.* Greenhouse, *Court to Review Mail-Order Tax Curb*, N.Y. Times, Oct. 8, 1991 at D1, col. 3 (states estimate a $3 billion annual revenue loss).

Commission on Intergovernmental Relations,[41] mail order sellers could be held accountable for as much as $9.5 billion in past taxes. *See* Appendix E.[42] This figure does not even account for additional liabilities imposed by interest and penalty assessments authorized by every taxing statute. Penalties for failure to collect and remit taxes average twenty-five percent of the unpaid tax, and interest rates range from eight to 28 percent. 1A All St. Sales Tax Rep. (CCH) ¶ 8-350 at 9733-9735 (1991); *see, e.g.*, Fla. Stat. Ann. § 212.12(2)(a) (West 1989) (penalty of 5 percent per month up to a maximum of 25 percent); Idaho Code § 63-3046(o) (Michie 1989) (penalty of 5 percent per month up to a maximum of 25 percent); N.J. Stat. Ann. § 54:49-4 (West 1991) (penalty of $100.00 per month plus 5 percent per month up to a maximum of 25 percent). If the calculations are limited to liabilities under recently enacted statutes, mail order sellers face approximately $5 billion in liability for uncollected taxes. *See* Appendix F.

The billions of dollars at stake would come directly from mail order sellers. While the tax itself is owed by the consumer, not by the mail order seller, states have claimed the power to directly assess sellers who fail to

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[41] *See* Advisory Commission on Intergovernmental Relations, *Estimates of Revenue Potential from State Taxation of Mail Order Sales* 9 (1987) ("ACIR Study") (estimating mail order tax revenue in 1988 at approximately $2.4 billion). The ACIR Study figures are disputed by many parties, but even using the most conservative estimate ($694 million annually), the potential retroactive tax liability for past years is huge.

[42] Although the states could conceivably attempt to reach back to impose back tax liability on sales made since the effective date of the catalog nexus provisions (as early as the 1940's in some states), such efforts would be severely impaired by practical constraints resulting from the lack of available records. In estimating the potential exposure faced by mail order sellers, a seven-year period was selected to provide a conservative estimate of the realistic exposure. *See* Appendix E.

collect the required use tax.[43] As a practical matter none of this retroactive tax liability can be recovered from the consumer that owed the tax. The resulting hardship would occur not as a consequence of a calculated business gamble in refusing to collect tax, but in express reliance on direct Supreme Court precedent that unambiguously defined the scope of the seller's obligation.

III. SINCE JUSTIFIED, SETTLED EXPECTATIONS ARE AT STAKE, THE COURT SHOULD ADHERE TO *BELLAS HESS*

Under these circumstances, this Court should reaffirm *Bellas Hess* and the principle that mail order companies cannot be subject to use tax obligations unless they are physically present in the taxing state. To be sure, *Bellas Hess* is a constitutional case, and the Court has noted that *stare decisis* has "more force in statutory analysis than in constitutional adjudication because, in the former situation, Congress can correct [the Court's] mistakes through legislation . . . ." *Monell v. Dep't of Social Services*, 436 U.S. 658, 695 (1978). Yet in constitutional cases as well, "[t]here is a strong public interest in stability, and in the orderly conduct of our affairs, that is served by a consistent course of constitutional adjudication."[44] Thus, "any departure from the doctrine of *stare decisis* demands special justification." *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984).[45]

Among the "weighty considerations" which "underlie the principle that courts should not lightly overrule past decisions," first is the desirability of enabling individuals "to plan their affairs with assurance against untoward

[43] *See* 1 All St. Sales Tax Rep. (CCH) ¶ 2-025 at 2012 (1991); *Prentice-Hall's Guide to Sales and Use Taxes* 28, 29 (1985).

[44] *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 780-81 (1986) (Stevens, J., concurring).

[45] *See also City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 419-20 (1983).

surprise . . . ." *Moragne v. State Marine Lines, Inc.*, 398 U.S. 375, 403 (1970). "When rights have been created or modified in reliance on established rules of law, the arguments against their change have special force." *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272 (1980).

Since *amici* and others have operated their businesses under *Bellas Hess* for nearly a quarter of a century, there are "strong reliance interests that would be threatened"[46] —and indeed frustrated—if this Court overruled *Bellas Hess*. Since 1967, "the reliance interest sought to be protected by the doctrine of *stare decisis* has grown up around the settled rule."[47] A number of considerations strongly suggest that reliance interests are even more weighty in this case than in most constitutional cases:

First, while reliance interests always require this Court to reassess precedents with caution, reliance is especially important for business decision-making. As noted above, "[c]onsiderations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved . . . ." *Payne*, 111 S.Ct. at 2610. Businesses carefully tailor their operations to this Court's decisions.[48] Where businesses have justifiably relied on precedent, overruling severely disrupts business planning and operation.

Thus, the Court has strongly preferred stability in cases impacting business planning. In *National Bank v. Whitney*, 103 U.S. 99 (1880), for example, the Court considered whether it should overrule *National Bank v.*

[46] *Arkansas Electric Cooperative Co. v. Arkansas Public Utility Commission*, 461 U.S. 375, 392 (1983).

[47] *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266, 300 (1987) (O'Connor and Powell, JJ., and Rehnquist, CJ., dissenting).

[48] *See, e.g.*, W. Knepper, *Liability of Corporate Officers and Directors* § 14.02 at 418 (3d ed. 1978); J. Ayre, *Corporate Legal Departments: Strategies for the 1980s* 93 (1984).

Matthews, 98 U.S. 621 (1878), which had interpreted an Act of Congress to allow a national bank to enforce a mortgage of lands against the mortgagor and parties claiming under him. The Court noted that "[i]t is not unreasonable to suppose that [national banks] have conducted their business and made loans to a large amount in reliance upon [*Matthews*], and that in many cases great injury would follow a departure from it." *Whitney*, 103 U.S. at 102. Under these circumstances the Court declined to overrule *Matthews*.

> Judicial decisions affecting the business interests of the country should not be disturbed except for the most cogent reasons, certainly not because of subsequent doubts as to their soundness. The prosperity of a commercial community depends, in a great degree, upon the stability of the rules by which its transactions are governed.[49]

Second, adherence to *Bellas Hess* is particularly appropriate because it would affect the tax consequences of past conduct. The Court has been especially hesitant to impose massive retroactive tax liabilities, recognizing that tax planning is one of the foundations of business operations.

For example, in *Helvering v. Griffiths*, 318 U.S. 371, 402 (1943), the Court refused to find that Congress had intended a statutory change in the tax law seven years previously to overturn, *sub silentio*, *Eisner v. Macomber*, 252 U.S. 189 (1920), which had held that stock dividends were not taxable. In language strikingly applicable to this Court's reconsideration of *Bellas Hess*, the *Griffiths* Court noted that: "We are asked to make a retroactive holding that for some seven years past a multitude of transactions have been taxable although there was no source of law from which the most cautious taxpayer could have learned of the liability." *Griffiths*, 318 U.S. at 402. The Court explained that such a change in tax administration would

[49] *Whitney*, 103 U.S. at 102.

be extremely detrimental: "To rip out of the past seven years of tax administration a principle of law on which both Government and taxpayers have acted would produce readjustments and litigation so extensive we would contemplate them with anxiety." *Id.* at 403.

Third, this case involves the interpretation of the Commerce Clause—a constitutional provision that was itself designed to promote stability in commerce. So far as we have been able to determine, in the Commerce Clause context this Court has never overruled a precedent where it has been shown that this would have imposed substantial retroactive liability resulting from justified reliance on an overruled decision. As we demonstrate in greater detail in Appendix G, in many overruling cases the Court dealt with newly enacted statutes which presented no significant problem of retroactivity. In others the Court either overruled prospectively or indicater that protection from retroactive liability remained an open question.

Fourth, Congress' power to legislatively modify or overrule *Bellas Hess* suggests that *Bellas Hess* merits even greater deference than would be accorded to most constitutional decisions of this Court. Here, the Court is not addressing a fundamental right that even Congress cannot reach with legislation;[50] rather, the Court is reassessing a Commerce Clause precedent, which Congress can modify using its *active* Commerce Clause power.[51]

[50] *Cf. Thornburgh*, 476 U.S. at 787 (White, J., and Rehnquist, CJ., dissenting); *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-07 (1932) (Brandeis, J., dissenting) ("in cases involving the Federal Constitution, *where correction through legislative action is practically impossible*, this Court has often overruled its earlier decisions") (emphasis added).

[51] *See* Const. art. I, § 8, cl. 3; *see also, e.g., South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 87 (1984). National Bellas Hess also challenged the Illinois use tax statute on Due

In fact, in *Bellas Hess* this Court specifically recognized Congressional power to change the result, noting that "[u]nder the Constitution, this is a domain where Congress alone has the power of regulation and control." *Bellas Hess*, 386 U.S. at 760. But that is an invitation which Congress has long declined. *See supra* p. 10.

Bellas Hess is therefore entitled to extreme deference since, as in the case of statutory interpretation, "correction can be had by legislation."[52] Here, as in statutory cases, legislation can make a change "with infinitely less derangement of [reliance] interests than would follow a new ruling of the court, for statutory regulations would operate only in the future." *Whitney*, 103 U.S. at 102.[53]

Finally, this Court's recent decisions severely restricting the availability of prospective overruling suggest that

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Process grounds. *Bellas Hess*, 386 U.S. at 756. The Court noted that the Due Process and Commerce Clause claims "are closely related" (*id.*), and invited Congress to change the *Bellas Hess* result if it saw fit (*id.* at 760); thus, the Court apparently assumed that any Due Process problems with use tax nexus could be resolved by Congressional "regulation and control." *Id.; see also, e.g.*, Hellerstein, *Significant Sales and Use Tax Developments During the Past Half Century*, 39 Vand. L. Rev. 961, 983-92 (1986) (Congress possesses power to legislate in areas protected by Due Process Clause); Hartman, *Collection of the Use Tax on Out-of-State Mail-Order Sales*, 39 Vand. L. Rev. 993, 1021-31 (1986) (same).

[52] *Burnet, supra* n.50; *see also, e.g., Monell v. Dep't of Social Services*, 436 U.S. 658, 695 (1978); *United States v. South Buffalo R. Co.* 333 U.S. 771, 774 (1948); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 60 (1977) (White, J., concurring).

[53] Compare *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272 n.18 (1980) (*stare decisis* is entitled to less deference in a full faith and credit case, where Congress does not act with unfettered authority) to *Houston & Texas Ry. v. United States*, 234 U.S. 342, 350 (1914) (noting "the complete and paramount charatcer of the power confided to Congress to regulate commerce among the several States").

the Court should adhere even more faithfully to principles of *stare decisis*. For more than twenty years, when faced with a perceived need to overrule precedent, this Court has dealt with especially troublesome reliance interests by limiting the retroactive effect of the overruling decision so as to avoid upsetting settled expectations. *See* p. 26 *infra*. Recently, however, this Court has questioned whether prospective overruling is ever permissible.[54] If prospective overruling is no longer available, *stare decisis* is even more fundamental to fairness for litigants: "Because it forces us to consider the disruption that our new decisional rules cause, retroactivity combines with *stare decisis* to prevent us from altering the law each time the opportunity presents itself." *James B. Beam Distilling Co. v. Georgia*, 111 S.Ct. 2439, 2450 (1991) (Blackmun, Marshall, and Scalia, JJ., concurring in the judgment).[55]

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[54] *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. at 2446 (opinion of Souter and Stevens, JJ.) ("[a]ssuming that pure prospectivity [in civil cases] may be had at all . . . its scope must necessarily be limited to a small number of cases . . . ."); *cf. Griffith v. Kentucky*, 479 U.S. 314 (1987) (announcing a rule of absolute retroactivity in criminal cases).

[55] Some Justices have argued that prospective overruling respects *stare decisis* because it allows the Court to change its mind without disappointing settled expectations. "At its core, *stare decisis* allows those affected by the law to order their affairs without fear that the established law upon which they rely will suddenly be pulled out from under them . . . . By not applying a law-changing decision retroactively, a court respects the settled expectations that have built up around the old law." *Beam*, 111 S. Ct. at 2452 (O'Connor and Kennedy, JJ., and Rehnquist, CJ., dissenting). Others have argued that prospective overruling is bad, because it gives the Court too much flexibility and thereby undermines *stare decisis*. "By announcing new rules prospectively or by applying them selectively, a court may dodge the *stare decisis* bullet by avoiding the disruption of settled expectations that otherwise prevents us from disturbing our settled precedents." *Beam*, 111 S. Ct. at 2450 (Blackmun, Marshall, and Scalia, JJ., concurring in the judgment).

Thus, whenever this Court has reassessed one of its precedents, it has recognized that it must avoid disrupting settled expectations. This case involves a valid precedent on which nearly twenty-five years of business plans have been based. Under these circumstances, *stare decisis* supports reaffirmation of *Bellas Hess*.

IV. IF THIS COURT WERE TO OVERRULE *BELLAS HESS*, IT SHOULD LIMIT THAT DECISION TO SOLELY PROSPECTIVE EFFECT

The same concerns that drive *stare decisis* also strongly counsel that, if *Bellas Hess* is overruled, such a decision be only prospective in application if that approach remains available.[56] Under *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), the Court may limit the retroactive effect of a decision provided that the case meets three criteria: (1) the decision "establish[es] a new principle of law, either by overruling clear past precedent on which litigants may have relied, . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed"; (2) the Court has "weigh[ed] the merits and demerits . . . by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation"; and (3) the Court

[56] *Amici* recognize that this Court may not sanction "modified, or selective prospectivity," in which "a court may apply a new rule in the case in which it is pronounced, then return to the old one with respect to all others arising on facts predating the pronouncement." *Beam*, 111 S.Ct. at 2444 (opinion of Souter and Stevens, JJ.); *see id.* at 2448 (White, J., concurring in the judgment); *id.* at 2449 (opinion of Blackmun, Marshall and Scalia, JJ., concurring in the judgment); *see supra* p. 25. But we understand the Court not to have foreclosed its ability to apply an overruling decision with *complete* prospectivity, "under which a new rule is applied neither to the parties in the law-making decision nor to those others against or by whom it might be applied to conduct or events occurring before that decision." *Id.* at 2443 (opinion of Souter and Stevens, JJ.); *see id.* at 2449 (White, J., concurring in the judgment), 2452-56 (opinion of O'Connor and Kennedy, JJ., and Rehnquist, CJ., dissenting).

has "weighed the inequity imposed by retroactive application" and found that the new ruling "could produce substantial inequitable results if applied retroactively . . . ." *Id.* at 106-07 (citations omitted).

Amici have already demonstrated that this case quintessentially satisfies the first and third prongs of *Chevron Oil*. As shown above, any decision overruling *Bellas Hess* would contradict nearly twenty-five years of this Court's decisions, and, if such a decision were applied retroactively, it would pose substantial and unjust hardship. This case also satisfies the second prong of *Chevron Oil*. The policies behind any overruling of *Bellas Hess* would not be furthered by applying the decision retroactively, for several reasons:

First, the principal purported interest of the states in advancing the new "economic nexus" test is to raise state revenues by forcing mail order companies to collect and remit use taxes from consumers, who are said to "escape" taxation.[57] *Amici* disagree with the premise,[58] but even if the interest were a legitimate basis for overruling *Bellas Hess*, the policy simply is not served by retroactive overruling. Retroactive overruling would create new and purely retroactive liabilities for mail order companies, as opposed to the consumers who are said to be "escaping" taxation. The end result would be to make mail order companies, rather than consumers, pay the tax.

Second, another argument advanced for overruling *Bellas Hess* is to make mail order use tax nexus comport with allegedly new factual and legal conditions in the mail order industry.[59] While, as noted above, *amici* disagree with this argument,[60] in any event that policy ap-

[57] *Quill*, Pet. App. A25.

[58] *See Brief of Petitioner*.

[59] *Quill*, Pet. App. A10-A11.

[60] *Supra* pp. 7-9.

pears fundamentally prospective in nature. The Court would be judicially noting that factual or legal changes in the industry have forced the introduction of a new standard of nexus. The policy behind such a holding would not be furthered by allowing states to reach back in time and collect monies that they were not owed under *Bellas Hess*.

Finally, some have argued that overruling *Bellas Hess* would eliminate a perceived disparity between interstate and intrastate retailers.[61] Again, *amici* disagree that any such disparity, if present, could justify the introduction of a new disparity favoring in-state retailers.[62] Nevertheless, if this interest were to underlie a decision to overrule *Bellas Hess*, it would hardly be served by shouldering mail order companies with a substantial retroactive tax liability not borne by local retailers. Yet that would be the inevitable result of any decision to overrule *Bellas Hess* with full retroactive effect. Thus, if the Court decided that it must overrule *Bellas Hess*, under *Chevron Oil* the Court should limit the retroactive effect of its decision to avoid the inequities that would otherwise result.

* * *

Amici have argued that *stare decisis* supports reaffirmation of *Bellas Hess*, and that alternatively, if the Court determined to overrule *Bellas Hess*, it should do so only prospectively. Neither argument, however, should obscure two central facts: *Bellas Hess* was correctly decided in 1967, and the precedent continues to protect mail order companies from unjustifiable and discriminatory burdens on interstate commerce that would inevitably result in its absence.

Congress remains the proper forum for addressing states' concerns about the ability to raise revenue and mail order companies' justified fears about collection

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[61] *Quill*, Pet. App. A24-A25.

[62] *Supra* p. 4 (noting discrimination which would flow from imposing use tax collection burdens on interstate sellers).

burdens. There, the question of how much entanglement of interstate commerce should be tolerated in light of state fiscal concerns can be addressed based on a complete factual record, and burdensome and discriminatory obligations could be avoided. If Congress were persuaded to act, it could do so prospectively, to avoid upsetting reliance interests, and could implement changes using a phase-in period that would not suddenly impose new collection burdens on mail order companies. Until and unless that occurs, *Bellas Hess* should not be disturbed.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment below.

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APPENDICES

APPENDIX A

INTEREST OF *AMICI*

Arizona Mail Order Company, Inc. is a national mail order company located in Tucson, Arizona, selling women's fashion merchandise by mail from its facilities in Arizona. Arizona Mail Order Company is currently involved in use tax collection proceedings in California.

Bass Pro Shops, Inc. is a mail order company selling sporting goods. Bass Pro Shops faces numerous claims of retroactive tax liability, and is currently litigating use tax collection cases in Arkansas and California.

Bloomingdale's By Mail Ltd. is a New York corporation conducting a general merchandise mail order business from its fulfillment center in Cheshire, Connecticut. By Mail is currently involved in use tax litigation in Tennessee and Pennsylvania, and has received numerous requests from states to register and begin collecting use tax, despite a lack of physical presence.

The Bradford Exchange, Ltd., located in Niles, Illinois, sells collectors' plates by mail in all 50 states. Many of its customers purchase from single page advertisements in national magazines and pay by check. The Bradford Exchange is very concerned about the possibility of retroactive use tax liability, having received requests from many states that want the company to collect and remit use taxes.

Cabela's Inc., is a mail order sporting goods company located in Sidney, Nebraska. Cabela's sends its catalogs throughout the United States and many foreign countries, and receives and fills orders from around the world. Cabela's is currently involved in use tax administrative proceedings in California and Tennessee, and has received requests from numerous other states that the company register and collect use tax, despite a lack of physical presence in those states.

Current, Inc. is a Delaware direct marketing company that sells primarily paper goods and stationery from its facilities in Colorado Springs, Colorado. Current is involved in use tax litigation in Tennessee, and many states have informed Current that the states will seek to impose use tax collection obligations.

Doubleday Book & Music Clubs, Inc. is a national direct marketer of books and music operating in New York and Pennsylvania. Doubleday Book & Music Clubs has received a request from Ohio to register and collect use tax.

Fingerhut Companies, Inc. is the nation's fourth largest catalog marketing company, located in Minnesota. Fingerhut Companies sells name brand and private label merchandise primarily to a lower middle income market, with an active base of more than 13 million customers. The company employs approximately 7,000 people at locations in Minnesota and Wisconsin. Fingerhut Companies has received requests from many states to register and collect use tax, and one affiliate has been subject to administrative proceedings in California.

Hanover Direct Inc., located in Hanover, Pennsylvania, is one of the largest direct marketing firms in the United States. Hanover Direct offers four different lines of merchandise through its 22 mail order catalogs.

Harry and David is a mail order seller of premium gift food items, located in Medford, Oregon. Harry and David is involved in use tax litigation in Tennessee, and has been contacted by other states attempting to impose use tax collection obligations despite a lack of physical presence.

Lillian Vernon Corp. is a Delaware specialty mail order company offering gift, household, decorative and children's merchandise to customers throughout the United States from its location in Virginia. Lillian Vernon is involved in use tax proceedings in California and Tennessee.

MBI, Inc. is a Connecticut mail order company that markets collectibles from its facility in Norwalk, Connecticut. Many states have requested that MBI collect and remit use taxes, and the company is concerned about the possibility of retroactive tax liabilities, given states' apparent disregard of *Bellas Hess.*

The Neiman Marcus Group, Inc. is a Delaware corporation whose Neiman Marcus, Bergdorf Goodman, and Horchow Collections divisions participate in direct marketing throughout the United States. The Neiman Marcus Group, Inc. collects and remits use taxes where it is physically present, but has not done so where nexus has not been demonstrated. The Neiman Marcus Group, Inc. is currently involved in use tax litigation in Tennessee and Connecticut.

New Hampton, Inc. is a mail order seller of women's and children's clothing based in Hampton, Virginia. New Hampton has been contacted several times by most of the states that are actively attempting to challenge *Bellas Hess*, and has received retroactive assessments of approximately $3 million from two states.

Publishers Clearing House is a multi-magazine subscription agency located in New York that sells nationwide via direct mail for over 200 leading publishers located in the United States and Canada. Publishers Clearing House has received requests from numerous states to register and collect use tax.

Rodale Press, Inc. is a publisher of books and magazines. Rodale Press has been contacted by numerous states attempting to impose use tax collection obligations despite the prohibition of *Bellas Hess.*

SFA Folio Collections, Inc. is a nationwide mail order company located in Yonkers, New York, offering general merchandise. Folio is currently involved in use tax litigation in Tennessee, and has received numerous requests to register and begin collecting use tax in states in which it is not physically present.

USAA Buying Services, Inc. is a nationwide mail order company located in San Antonio, Texas. USAA Buying Services solicits sales throughout the United States by catalogs offering jewelry, electronics, and gift items. USAA Buying Services has received many requests from states that want the company to register and collect use tax, despite the prohibition of *Bellas Hess*.

APPENDIX B

STATE STATUTES THAT DEFINE NEXUS TO INCLUDE MERE CATALOG SOLICITATION (PRE-*BELLAS HESS*)**

State	Statute(s)	Description of Liability	Effective Date
Alabama	Ala. Code § 40-23-66 (originally tit. 51 § 790)	"distributes catalogues or other advertising matter and by reason thereof receives and accepts orders from residents, within the state of Alabama" (construed in 1965 to avoid Federal constitutional invalidation (*supra* p. 12 n.21))	1945
Arkansas	Ark. Stat. Ann. § 26-53-102(4) (originally § 84-3104(d))	"vendor" = "every person engaged in making sales of tangible personal property, by mail order, by advertising"	1961
Colorado	Colo. Rev. Stat. § 30-26-102(3)(b) (originally § 138-5-2(22)(c))	"Doing business in this state" = "soliciting . . . by distribution of catalogues or other advertising"	1967
Florida	Fla. Stat. Ann. § 212.06(2)(g)	"Dealer" = "every person who solicits business . . . by distribution of catalogues or other advertising matter"	1955

State	Statute(s)	Description of Liability	Effective Date
Georgia	Ga. Code Ann. § 48-8-2(3)(H) (earlier § 91A-4501(c)(8) and § 92-2150.4)	"Dealer" = "every person who . . . solicits business . . . by the distribution of catalogues or other advertising matter and by reason of the solicitation receives and accepts orders from consumers in this state"	1951
Illinois	Ill. Stat. Ann. ch. 120 § 439.2	"retailer maintaining a place of business in this state" = "engaging in soliciting orders within this state from users by means of catalogue or other advertising"	1961
Kansas	Kan. Stat. Ann. § 79-3702(h)(2)	"retailer doing business in the state" = "engaging in soliciting orders within this state from users by means of catalogues or other advertising"	1965
Michigan	Mich. Admin. Code r. 205.26	"out-of-state seller . . . actively soliciting sales of tangible personal property in Michigan"	1961

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Mississippi	Miss. Code Ann. § 27-67-3 (earlier § 10146-02(11))	"retailer maintaining a place of business in this state" = "soliciting orders, or advertising through any media within this state"	1955
Missouri	Mo. Stat. Ann. § 144.605(11)	"vendor" = "every person engaged in making sales of tangible personal property by mail order, by advertising"	1959
New Jersey	N.J. Stat. § 54:328-2(i)(1)(C)	"vendor" = "a person who solicits business . . . by distribution of catalogs or other advertising matter and by reason thereof makes sales to persons within the state"	1966
New Mexico	N.M. Stat. Ann. § 72-17-5	Subject to use tax if "retailer selling tangible personal property for . . . use . . . in this state" (no nexus definition)	1939
[same]	Ch. 47, § 10, Laws of 1966	"Every person carrying on or causing to be carried on any activity within this state attempting to exploit New Mexico's markets, who sells property . . . for use in this state" "Activity" = "delivering . . . products as a consequence of an advertising or other sales program directed at potential customers"	1966

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State	Statute(s)	Description of Liability	Effective Date
New York	N.Y. Tax Law § 1101(b)(8)	"vendor" = "a person who solicits business . . . by distribution of catalogues or other advertising matter"	1965
Ohio	Ohio Rev. Code Ann. § 5741.01(H)	"Engaged in the business of selling in this state" = "soliciting business by distribution of catalogs or other advertising matter, or by any means whatsoever, and by reason thereof, receiving orders for tangible personal property from consumers within this state"	1962
Pennsylvania	Pa. Stat. Ann. tit. 72 § 7201(b)(3)	"maintaining a place of business in this Commonwealth" = "regularly or substantially soliciting orders within this Commonwealth . . . by means of catalogues or other advertising"	1959
Rhode Island	R.I. Gen. Laws § 44-18-23(C)	"engaging in business" = "solicitation of orders and advertising in this state . . . by circulars, coupons, samples, and similar advertising material mailed to, or distributed within this state to residents of this state; and telephone solicitation of orders from residents of this state"	1958
[same]	[as amended]	"solicitation of orders and advertising in this state by means of . . . catalogs . . . mailed to or distributed within this state to residents of this state"	1966
South Carolina	S.C. Code Ann. § 12-35-840 (earlier § 65-1424)	"Every person or company who distributes catalogues or other advertising matter and by reason thereof receives and accepts orders from residents within the state"	1951
Tennessee	Tenn. Code Ann. § 67-6-102 (earlier § 1248.53)	"dealer" = "any person . . . who distributes catalogues or other advertising matter and by reason thereof receives and accepts orders from residents of this State"	1955
Vermont	Vt. Stat. Ann. tit. 32 § 9701(9)(C)	"vendor" = "a person who solicits business . . . by distribution of catalogues or other advertising matter"	1969

State	Statute(s)	Description of Liability	Effective Date
Virginia	Va. Code Ann. § 58-441.12(h)	"Dealer" = "every person who . . . solicits business in this state . . . by distribution of catalogues or other advertising matter"	1966

** When *Bellas Hess* was decided in 1967, both Idaho and Massachusetts had use tax statutes which contained catalog nexus provisions. Subsequent amendments expressly prohibited enforcement against a seller whose activities "consist solely of solicitation by direct mail or of advertising which does not involve the physical presence of agents or other representatives." Idaho Code § 63-6311(3) (1969); *see also* Mass. Gen. Laws ch. 64H § 1(5) (1971) ("engaged in business in the commonwealth" includes "regularly soliciting orders . . . unless such activity consists solely of solicitation by direct mail . . . .").

APPENDIX C

STATE STATUTES DRAFTED TO SPECIFICALLY CHALLENGE *BELLAS HESS*

State	Statute(s)	Description of Liability	Effective Date
Alabama	Ala. Code § 40-23-1(a)(5)	Deems common carrier or U.S. Postal Service to be seller's agent	4-30-86
	Ala. Code § 40-23-68, amended by Act 576 (H.B. 371) (Supp. 1990)	"substantial and recurring" solicitation + benefits from banking, financing, debt collection; catalog distribution	9-01-91
Arizona	Ariz. Rev. Stat. Ann. § 42-1401(5)(b) (Supp. 1989)	"substantial and recurring" solicitation + benefits from banking, financing, debt collection, etc.	9-15-89
Arkansas	Ark. Stat. Ann. § 26-53-121(b) (Supp. 1989)	"continuous, regular or systematic solicitation" by mail, catalog or media	7-01-87
California	Cal. Rev. & Tax. Code § 6203 (West 1975 & Supp. 1991)	"substantial and recurring" solicitation and benefits from banking, financing, debt collection, etc.; affiliate "in the same or a similar line of business" in the state	1-01-88

State	Statute(s)	Description of Liability	Effective Date
Colorado	Colo. Rev. Stat. § 39-26-301 *et seq.* (Supp. 1991)	out-of-state retailer subject to tax by federal legislation	Enacted 1990 (eff. upon passage of federal legis.)
Connecticut	Conn. Gen. Stat. Ann. § 12-407(12), (15) (West Supp. 1991)	"regular or systematic" solicitation by mail, catalog, media; affiliate in "same as or similar" line of business in the state	7-01-89
Florida	Fla. Stat. Ann. § 212.0596 (West Supp. 1991)	Taxes "mail order sales" if dealer "purposefully or systematically exploiting the market" by catalogs, advertising or media	10-01-87
Georgia	Ga. Code Ann. § 48-8-2(3)(H) (Supp. 1991)	"regular or systematic solicitation" by catalogs, advertising or media	7-01-90
Idaho	Idaho Code § 12-407(12), (15) (Supp. 1989)	"substantial and recurring" solicitation + benefits from banking, financing, debt collection, etc.; affiliate engaged in "same or similar line of business in the state"	7-01-89
Illinois	Ill. Ann. Stat. ch. 120 ¶ 439.2 (Smith-Hurd 1991)	"substantial and recurring" solicitation and benefits from banking, financing, debt collection, etc.; affiliate engaged in "same or similar line of business in this state"	1-01-90
Iowa	Iowa Code Ann. § 422.43(12) (West 1990)	"continuous, regular, seasonal or systematic" solicitation by mail and benefits from banking, financing, debt collection, etc.; affiliate engaged in "same or similar line of business in the state"	7-01-88
Kansas	Kan. Stat. Ann. § 79-3702(h) (Supp. 1990)	"regular or systematic" solicitation by mail, catalogs, advertising or media	7-01-90
Kentucky	Ky. Rev. Stat. Ann. § 139.340(2) (Michie 1991)	"continuous, regular or systematic" solicitation if solicitation, placement or payment of order utilizes "financial institution, telecommunication system, radio or television station, cable television service, print media, or other facility or service located in this state"	7-15-88
Louisiana	La. Rev. Stat. Ann. § 47:301(4)(l) (West Supp. 1991)	"regular or systematic" solicitation by mail, catalogs, advertising, media, etc.	7-01-90
[same]	§ 47:305E (West Supp. 1991)	sales promoted through catalogs "and for which federal legislation or federal jurisprudence enables" taxation	7-01-90

State	Statute(s)	Description of Liability	Effective Date
Massachusetts	Mass. Ann. Laws ch. 64H § 1(5) (Law. Co-op. Supp. 1991)	"regularly or systematically" soliciting sales or "exploiting the retail sales market" by mail, advertising, media, etc.	1-01-89
Minnesota	Minn. Stat. Ann. § 297A.21(4) (West Supp. 1991)	Distribution of catalogs or written solicitations by mail, or solicitation by media or any communication system, if annual Minnesota sales total $100,000 or more than 100 in-state transactions annually	6-01-88
Mississippi	Miss. Code Ann. § 27-67-4 (Supp. 1989)	"purposefully or systematically exploiting" consumer market by direct mail, unsolicited catalog distribution, media, etc.	7-01-88
Missouri	Mo. Stat. Ann. § 144.605(2) (West Supp. 1991)	"purposefully or systematically exploiting" market by direct mail, catalogs, media, etc.; affiliate "in same or similar line of business in this state"; sellers with no agents or place of business in the state and whose Missouri sales are less than $500,000 (or nationwide sales less than $12.5 million) are exempt	10-1-90
Nebraska	Neb. Rev. Stat. § 77-2702(21) (1990)	"continuous, regular, seasonal or systematic" solicitation and benefits from banking, financing, debt collection, etc.; affiliate "in same or similar line of business in this state"	10-01-87
Nevada	Nev. Rev. Stat. Ann. § 372.728 (Michie Supp. 1989)	"substantial and recurring" solicitation by mail or FAX and benefits from banking, financing, debt collection, etc.; affiliate "in same or similar line of business" in the state	10-01-89
New Mexico	Reg. GR 3(E):4	"regularly exploits New Mexico markets" by newspaper, telephone, media or direct mail	7-01-91
New York	N.Y. Tax Law § 1101(b)(8) (McKinney Supp. 1991)	"regular or systematic" solicitation by mail or other means, if such solicitation "satisfies the nexus requirement" of the U.S. Const.	9-01-89
North Carolina	N.C. Gen. Stats. § 105-164.3; § 105-164.8 (1989)	retailer who makes a "mail order sale" is subject to tax if "purposefully or systematically" soliciting by mail, catalog, advertising, media, etc.	1-01-89
North Dakota	N.D. Cent. Code § 57-40.2-01 (Supp. 1989)	"regular or systematic" solicitation by mail, catalog, advertising, media, etc.	7-01-87

State	Statute(s)	Description of Liability	Effective Date
Ohio	Ohio Rev. Code Ann. § 5741.01(H) (Anderson Supp. 1990)	"conducts a continuing pattern of advertising" by mail or media broadcasts, if seller benefits from banking, financing, debt collection, etc. in state	10-05-87; current 7-18-90
Oklahoma	Okla. Stat. Ann. 68 §§ 1354.1, 1354.2 (West Supp. 1991)	"continuous, regular or systematic solicitation" by advertisement through mail order or catalog publications	7-01-86
Rhode Island	R.I. Gen. Laws § 44-18-23	solicitation of orders and advertising in R.I. by means of catalogs and other advertising, telephone solicitation, or radio and t.v. advertising	9-01-90
South Carolina	S.C. Code § 12-36-70; § 12-36-1340 (Law. Co-op. Supp. 1990)	any seller that does not maintain an office in the state, but who solicits sales by catalogs, shall collect the tax	6-22-87
	Act 612, Laws 1990, as amended by H.B. 3272, Laws 1991	"exploit[ing] the South Carolina market through mail order sales, television shopping networks and shows, telephone "900" services, and other marketing techniques"	
Tennessee	Tenn. Code Ann. § 67-6-102(6)(J) (1989)	"regular or systematic" solicitation by mail, catalog, media, etc.	1-01-89
Texas	Tex. Tax Code Ann. § 151.107 (Vernon Supp. 1991)	"substantial and recurring" solicitation by mail and benefits from banking, financing, debt collection, etc.	7-22-87
Utah	Utah Code § 59-12-102(9)(C) (Supp. 1990)	"regular or systematic" solicitation by catalogs, mail, advertising, media, etc.	7-01-90
Vermont	Vt. Stat. Ann. tit. 32 § 9701(9) (Supp. 1990)	"regular, systematic, or seasonal solicitation" by mail, catalogs, advertising, media, etc., if seller makes annual Vermont sales of at least $50,000.00; "Vendor" also includes a person who "owns or controls a person engaged in the same or similar line of business in the state"	6-22-89
Virginia	Va. Code Ann. § 58.1-612(C) (1991)	"continuous, regular, seasonal or systematic" solicitation by mail + benefits from banking, financing, debt collection, etc.; affiliate located in the Commonwealth	7-01-91
Washington	Wash. Admin. Code 458-20-221 (1989)	"purposefully or systematically" exploits marketplace through catalogs, direct mail, media, etc.; affiliate in "same or similar line of business" in state	4-01-89

State	Statute(s)	Description of Liability	Effective Date
West Virginia	W. Va. Code § 11-15A-6a (Supp. 1990)	"substantial and recurring" solicitation and benefits from banking, financing, debt collection, etc. *IF* seller has physical presence or "any other presence that provides the necessary minimum contacts for a constitutionally sufficient nexus"	7-01-89

APPENDIX D

STATE STATUTES OF LIMITATIONS FOR THE ASSESSMENT OF USE TAX WHEN NO RETURN IS FILED

State	Statute(s)	Limitations Period If No Return Filed
Alabama	Ala. Code § 40-23-76 (1985)	None
Arizona	Ariz. Rev. Stat. Ann. § 42-113B1(b) (1991)	None
Arkansas	Ark. Code § 26-18-306(f) (1987)	None
California	Cal. Rev. & Tax Code § 6487 (West 1987)	8 Years
Colorado	Colo. Rev Stat. § 39-26-210 (1990)	3 Years
Connecticut	Conn. Gen. Stat. Ann. § 12-415(7) (West Supp. 1991) Conn. Gen. Stat. Ann. § 12-416(1) (West Supp. 1991)	None
District of Columbia	D.C. Code Ann. § 47-2011 (1990)	3 Years
Florida	Fla. Stat. Ann. § 95.091(3)(a)1(d) (West Supp. 1991)	None
Georgia	Ga. Code Ann. § 48-2-49(c) (1991)	None
Idaho	Idaho Code § 63-3633(c) (1989)	7 Years
Illinois	Ill. Ann. Stat. ch. 120 ¶ 439.12 (Smith-Hurd 1991) Ill. Ann. Stat. ch. 120 ¶ 444 (Smith-Hurd 1991)	None
Indiana	Ind. Code Ann. § 6-8.1-5-2(d) (West Supp. 1991)	None
Iowa	Iowa Code Ann. § 422.54 (West 1990) Iowa Admin. Code r. 701-11.2	None
Kansas	Kan. Stat. Ann. § 79-3609 (1989)	3 Years
Kentucky	Ky. Rev. Stat. Ann. § 139.620 (Michie 1991)	None

State	Statute(s)	Limitations Period If No Return Filed
Louisiana	La. Rev. Stat. Ann. § 47:1580(A)(5) (West 1990)	None
Maine	Maine Rev. Stat. Ann. tit. 36 § 141(2)(C) (1990)	None
Maryland	Md. Tax-Gen. Code Ann. § 13-1102(b) (1988)	None
Massachusetts	Mass. Ann. Laws ch. 62C § 26(d) (West 1988)	None
Michigan	Mich. Comp. Laws Ann. § 205.27a(2) (West Supp. 1991)	None
Minnesota	Minn. Stat. Ann. § 289A.38, Subdiv. 5 (West 1991)	None
Mississippi	Miss. Code Ann. § 27-65-42 (1990)	None
Missouri	Mo. Ann. Stat. § 144.220(i) (Vernon Supp. 1991)	None
Nebraska	Neb. Rev. Stat. § 77-2709(5)(c) (1990)	5 Years
Nevada	Nev. Rev. Stat. Ann. § 372.430 (Michie 1986)	8 Years
New Jersey	N.J. Stat. Ann. § 54:32B-27 (West 1986)	None
New Mexico	N.M. Stat. Ann. § 7-1-18 (1988)	7 Years
New York	N.Y. Tax Law § 1147(b) (McKinney 1987)	None
North Carolina	N.C. Gen. Stat. § 105-241.1(e) (1990)	None
North Dakota	N.D. Cent. Code Ann. § 57-39.2-15 (1991)	6 Years
Ohio	Ohio Rev. Code Ann. § 5741.16B (Baldwin 1986)	None
Oklahoma	Okla. Stat. Ann. tit. 68 § 223(c) (West 1966)	None
Pennsylvania	72 Pa. Cons. Stat. Ann. § 7259 (Purdon 1990)	None

State	Statute(s)	Limitations Period If No Return Filed
Rhode Island	R.I. Gen. Laws § 44-19-13 (1988)	None
South Carolina	S.C. Code Ann. § 12-54-80(1) (Law. Co-op. Supp. 1990)	None
South Dakota	S.D. Codified Laws Ann. § 10-59-16 (1989)	None
Tennessee	Tenn. Code Ann. § 67-1-1501(b)(1) (1989)	None
Texas	Tex. Tax Code Ann. § 111.205(2) (Vernon 1982 & Supp. 1991)	None
Utah	Utah Code Ann. § 59-12-110(9) (1987)	None
Vermont	Vt. Stat. Ann. tit. 32 § 9815(b) (1981 & Supp. 1990)	None
Virginia	Va. Code Ann. § 58.1-634 (1991)	6 Years
Washington	Wash. Rev. Code § 82.32.100 (Supp. 1991)	None
West Virginia	W. Va. Code § 11-10-15 (1987)	None
Wisconsin	Wis. Stat. Ann. § 77.59(8) (West 1989)	None
Wyoming	Wy. Stat. § 39-6-510 (1991)	None

APPENDIX E

ESTIMATED POTENTIAL RETROACTIVE TAX LIABILITY (IN MILLIONS) FOR THE YEARS 1985 THROUGH 1991 IF *NATIONAL BELLAS HESS, INC. v. DEP'T OF REVENUE*, 386 U.S. 753 (1967) WERE OVERRULED

1985 - 1991

State [1]	1985 [2]	1986 [2]	1987	1988 [2]	1989	1990	1991	Total Estimated Potential Tax Liability [3]
Arizona (1989)	0	0	0	0	9.39	32.21	32.21	73.81
Arkansas (1961)	11.53	12.22	12.22	14.34	14.34	14.34	14.34	93.33

Source: Advisory Commission on Intergovernmental Relations, Staff Information Report, *Estimates of Revenue Potential from State Taxation of Out-of-State Mail Order Sales* (Sept. 1987).

(1) Date shown is the effective date of earliest catalog nexus provision.

(2) ACIR Estimated Annual Revenue Total [In Millions]. This figure was adjusted by 11% to account for revenue attributable to mail order sales made by sellers with a physical presence in the state (based on ACIR estimate for the United States as a whole).

(3) The 1988 adjusted ACIR figures were used for 1989, 1990 and 1991, since no ACIR state estimates were available for those years. The 1986 adjusted ACIR figure was used for 1987. Liability was assumed to be zero for years in which a particular state had no effective catalog nexus provision, or in which assessment is barred by the state's statute of limitations.

State	1985	1986	1987	1988	1989	1990	1991	Total Estimated Potential Tax Liability
California (1988)	0	0	0	331.99	331.99	331.99	331.99	1,327.96
Connecticut (1989)	0	0	0	0	27.08	54.165	54.165	135.41
Florida (1955)	80.52	86.61	86.61	101.58	101.58	101.58	101.58	660.06
Georgia (1951)	27.57	30.48	30.48	35.75	35.75	35.75	35.75	231.53
Idaho (1989)	0	0	0	0	4.19	8.39	8.39	20.97
Illinois (1961)	87.60	92.35	92.35	108.30	108.30	108.30	108.30	705.50
Iowa (1988)	0	0	0	9.84	19.67	19.67	19.67	68.85
Kansas (1965)	0	0	0	0	19.40	19.40	19.40	58.20
Kentucky (1988)	0	0	0	13.80	30.10	30.10	30.10	104.10
Michigan (1961)	51.25	53.67	53.67	62.95	62.95	62.95	62.95	410.39
Minnesota (1988)	0	0	0	24.71	42.37	42.37	42.37	151.82
Mississippi (1955)	16.55	17.73	17.73	20.79	20.79	20.79	20.79	135.17
Missouri (1959)	32.41	34.83	34.83	40.86	40.86	40.86	40.86	265.51
Nebraska (1987)	0	0	2.19	10.27	10.27	10.27	10.27	43.27
Nevada (1989)	0	0	0	0	2.85	11.39	11.39	25.63
New Jersey (1966)	74.14	81.29	81.29	95.35	95.35	95.35	95.35	618.12
New Mexico (1966)	6.96	9.15	9.15	10.72	10.72	10.72	10.72	68.14
New York (1965)	122.54	135.29	135.29	158.69	158.69	158.69	158.69	1,027.79
North Carolina (1989)	0	0	0	0	42.09	42.09	42.09	126.27
North Dakota (1987)	0	0	2.70	5.40	5.40	5.40	5.40	24.30
Ohio (1962)	73.64	76.71	76.71	89.98	89.98	89.98	89.98	586.98
Oklahoma (1986)	0	8.19	16.39	19.22	19.22	19.22	19.22	101.46
Pennsylvania (1959)	92.14	96.96	96.96	113.73	113.73	113.73	113.73	740.98
Rhode Island (1958)	7.87	8.37	8.37	9.82	9.82	9.82	9.82	63.89
South Carolina (1951)	21.01	22.47	22.47	26.36	26.36	26.36	26.36	171.39

State	1985	1986	1987	1988	1989	1990	1991	Total Estimated Potential Tax Liability
Tennessee (1955)	34.05	37.23	37.23	43.67	43.67	43.67	43.67	283.19
Texas (1987)	0	0	57.22	161.08	161.08	161.08	161.08	701.54
Utah (1990)	0	0	0	0	0	7.22	14.44	21.66
Vermont (1969)	2.90	3.18	3.18	3.74	3.74	3.74	3.74	24.22
Virginia (1966)	34.96	42.53	42.53	49.89	49.89	49.89	49.89	319.58
Washington (1989)	0	0	0	0	45.78	61.04	61.04	167.86
West Virginia (1989)	0	0	0	0	7.21	14.42	14.42	36.05
							Total:	$9,594,930,000

APPENDIX F

ESTIMATED POTENTIAL RETROACTIVE TAX LIABILITY (IN MILLIONS) FOR THE YEARS 1986 THROUGH 1991 IF *NATIONAL BELLAS HESS, INC. v. DEP'T OF REVENUE*, 386 U.S. 753 (1967) WERE OVERRULED (BASED ON NEWLY ENACTED STATUTES ONLY)

State	Eff. Date	1986	1987 [1]	1988 [1]	1989	1990	1991	Total Estimated Potential Tax Liability [2]
Alabama	04/30/86	14.97	22.48	26.36	26.36	26.36	26.36	142.89
Arizona	09/15/89	0	0	0	9.39	32.21	32.21	73.81
Arkansas	07/01/87	0	7.17	14.34	14.34	14.34	14.34	64.53
California	01/01/88	0	0	331.99	331.99	331.99	331.99	1,327.96

Source: Advisory Commission on Intergovernmental Relations, Staff Information Report, *Estimates of Revenue Potential from State Taxation of Out-of-State Mail Order Sales* (Sept. 1987).

(1) ACIR Estimated Annual Revenue Total [in Millions]. This figure was adjusted by 11% to account for revenue attributable to mail order sales made by sellers with a physical presence in the state (based on ACIR estimate for the United States as a whole).

(2) To 12-31-91, using 1986 and 1988 unadjusted ACIR figures for estimated revenue potential, adjusted to account for mail order sales made by companies with an in-state physical presence. The 1988 adjusted ACIR figures were also used for computation in 1989, 1990 and 1991, since no ACIR estimate was available for those years. The 1986 adjusted figure was used for 1987 computations.

State	Eff. Date	1986	1987	1988	1989	1990	1991	Total Estimated Potential Tax Liability
Connecticut	07/01/89	0	0	0	27.08	54.165	54.165	135.41
Florida	10/01/87	0	21.65	101.58	101.58	101.58	101.58	427.97
Georgia	07/01/90	0	0	0	0	17.88	35.75	53.63
Idaho	07/01/89	0	0	0	4.19	8.39	8.39	20.97
Illinois	01/01/90	0	0	0	0	108.30	108.30	216.60
Iowa	07/01/88	0	0	9.84	19.67	19.67	19.67	68.85
Kansas	07/01/90	0	0	0	0	9.70	19.40	29.10
Kentucky	07/15/88	0	0	13.80	30.10	30.10	30.10	104.10
Minnesota	06/01/88	0	0	24.71	42.37	42.37	42.37	151.82
Mississippi	07/01/88	0	0	10.39	20.79	20.79	20.79	72.76
Missouri	10/01/90	0	0	0	0	10.22	40.86	51.08
Nebraska	10/01/87	0	2.19	10.27	10.27	10.27	10.27	43.27
Nevada	10/01/89	0	0	0	2.85	11.39	11.39	25.63
New Meixco	07/01/91	0	0	0	0	0	5.36	5.36
New York	09/01/89	0	0	0	52.89	158.69	158.69	370.27
North Carolina	01/01/89	0	0	0	42.09	42.09	42.09	126.27
North Dakota	07/01/87	0	2.70	5.40	5.40	5.40	5.40	24.30
Ohio	10/05/87	0	19.18	89.98	89.98	89.98	89.98	379.10
Oklahoma	07/01/86	8.19	16.39	19.22	19.22	19.22	19.22	101.46
Rhode Island	09/01/90	0	0	0	0	3.27	9.82	13.09
South Carolina	06/22/87	0	11.24	26.36	26.36	26.36	26.36	116.68
Tennessee	01/01/89	0	0	0	43.67	43.67	43.67	131.01
Texas	07/22/87	0	57.22	161.08	161.08	161.08	161.08	701.54
Utah	07/01/90	0	0	0	0	7.22	14.44	21.66
Vermont	06/22/89	0	0	0	1.87	3.74	3.74	9.35
Virginia	07/01/91	0	0	0	0	0	24.95	24.95
Washington	04/01/89	0	0	0	45.78	61.04	61.04	167.86
West Virginia	07/01/89	0	0	0	7.21	14.42	14.42	36.05
							Total:	$5,239,330,000.00

APPENDIX G

Commerce Clause Decisions Overruled by the United States Supreme Court

Overruling Decision	Overruled Decision(s)	Resolution of Retroactivity Problems
Wabash, S.L. & P.R. Co. v. Illinois, 118 U.S. 557 (1886)	*Peik v. Chicago & N.W. Ry. Co.*, 94 U.S. 164 (1877)	No retroactive liability demonstrated—new state statute immediately challenged and invalidated.
Philadelphia & Southern Mail S.S. Co. v. Pennsylvania, 122 U.S. 326 (1887)	*State Tax on Railway Gross Receipts*, 82 U.S. (15 Wall.) 284 (1873)	No retroactive liability demonstrated—state attempted to enforce tax liabilities based on *State Tax on Railway Gross Receipts.*
Leloup v. Port of Mobile, 127 U.S. 640 (1888)	*Osborne v. Mobile*, 83 U.S. (16 Wall.) 479 (1873)	No retroactive liability demonstrated—state attempted to enforce statute based on *Osborne.*
Leisy v. Hardin, 135 U.S. 100 (1890)	*Thurlow v. Massachusetts*, 46 U.S. (5 How.) 504 (1847)	No retroactive liability at stake—new state statute challenged and invalidated.
Alpha Portland Cement Co. v. Massachusetts, 268 U.S. 203 (1925)	*Baltic Mining Co. v. Massachusetts*, 231 U.S. 68 (1913)	No retroactive liability at stake—new state statute immediately challenged and invalidated.

Overruling Decision	Overruled Decision(s)	Resolution of Retroactivity Problems
East Ohio Gas Co. v. Tax Commissioner, 283 U.S. 465 (1931)	*Pennsylvania Gas Co. v. Public Service Commission*, 252 U.S. 23 (1920)	Parties did not raise retroactivity issue, and no significant reliance interests were at stake, since taxpayer had not relied on invalidated precedent. *See* Brief of Appellees at 9, *East Ohio Gas Co. v. Tax Commissioner* (O.T. 1930, No. 453).
United States v. Darby, 312 U.S. 100 (1941)	*Hammer v. Dagenhart*, 247 U.S. 251 (1918)	Indictment apparently sought to penalize only behavior that occurred after the Fair Labor Standards Act of 1938 (52 Stat. 1060) was passed (*Darby*, 312 U.S. at 109), and Court found that any reliance on *Hammer* was completely unfounded. *Id.* at 116-17.
California v. Thompson, 313 U.S. 109 (1941)	*DiSanto v. Pennsylvania*, 273 U.S. 34 (1927)	Court found *DiSanto* was "departure" from its jurisprudence (*Thompson*, 313 U.S. at 116), thus statute upon which misdemeanor convictions was based was in harmony with existing law.
Edwards v. California, 314 U.S. 160 (1941)	*New York v. Miln*, 36 U.S. (11 Pet.) 102 (1837)	State law invalidated in this case (allowing state to exclude paupers) had not been enforced by the State except in the year prior to its invalidation (*see* Brief of the Attorney General of the State of California on Behalf of the Appellee at 4, 24, *Edwards v. California* (O.T. 1941, No. 17)). Also, no discussion of retroactive impact before the Court.
United States v. Southeastern Underwriters Ass'n, 322 U.S. 533 (1944)	*Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869); *Hooper v. California*, 155 U.S. 648 (1895)	Significant retroactive liability at stake; Supreme Court reserved question of "[w]hether reliance on earlier statements of this Court in the *Paul v. Virginia* line of cases that insurance is not 'commerce' could ever be pleaded as a defense to a criminal prosecution under the Sherman Act . . . ." *Underwriters Ass'n*, 322 U.S. at 562 n.50.
Ott v. Mississippi Valley Barge Line Co., 336 U.S. 169 (1949)	*St. Louis v. Ferry Company*, 78 U.S. (11 Wall.) 423 (1871); *Old Dominion Steamship Co. v. Virginia*, 198 U.S. 299 (1905); *Ayer & Lord Tie Co. v. Kentucky*, 202 U.S. 409 (1906)	No significant retroactive liability implicated, and retroactivity argument not briefed before the Supreme Court.

Overruling Decision	Overruled Decision(s)	Resolution of Retroactivity Problems
Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977)	*Spector Motor Service v. O'Connor*, 340 U.S. 602 (1951)	Although appellant argued that it would face retroactive liability (Brief of Appellant at 33-36, *Complete Auto* (No. 76-29)), the Court noted that, by the time *Complete Auto* arose, "'only the most sanguine taxpayer would conclude that the Court maintains a serious belief in the doctrine that the privilege of doing interstate business is immune from state taxation'" (*Complete Auto*, 430 U.S. at 287) (quoting Hellerstein, *State Taxation of Interstate Business and the Supreme Court, 1974 Term:* Standard Pressed Steel *and* Colonial Pipeline, 62 Va. L. Rev. 149, 188 (1976)); thus, any reliance on *Spector Motor* was unjustifiable.
Washington Revenue Department v. Stevedoring Ass'n, 435 U.S. 734 (1978)	*Puget Sound Stevedoring Co. v. Tax Com.*, 302 U.S. 90 (1937), and *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422 (1947)	No retroactivity at stake: new statute was immediately challenged in declaratory judgment action.
Hughes v. Oklahoma, 441 U.S. 322 (1979)	*Geer v. Connecticut*, 161 U.S. 519 (1896)	No retroactivity implicated—state was trying to prosecute under statute invalidated in the case.
Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981)	*Heisler v. Thomas Colliery Co.*, 260 U.S. 245 (1922)	The Court had "long since rejected" *Heisler's* "mechanisal" intrastate/interstate distinction (*Commonwealth Edison*, 453 U.S. at 614-15); thus, any reliance on *Heisler* was unjustified. Also, retroactivity issue was not briefed, and was irrelevant given outcome of case (*i.e.*, statute upheld despite overruling of precedent utilized by State).
Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941 (1982)	*Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908)	No retroactive liability at stake: State had brought action to enjoin appellants from transferring water across the border without a permit, in reliance on *Hudson County Water Co.*; thus, overruling that precedent did not impose any retroactive liability on the State.
Arkansas Elec. Cooperative Co. v. Arkansas Public Service Commission, 461 U.S. 375 (1983)	*Public Utilities Commission of R.I. v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927)	No retroactive liability at stake as a result of reliance on prior precedent, since the Court noted that it could "find no strong reliance interests that would be threatened" by overruling *Attleboro*. *Arkansas Elec. Coop.*, 461 U.S. at 392.

Overruling Decision	Overruled Decision(s)	Resolution of Retroactivity Problems
Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue, 483 U.S. 232 (1987)	*General Motors Corp. v. Washington*, 377 U.S. 436 (1964)	Potentially significant retroactive liability at stake. Court remanded issue of retroactivity to state court. *Tyler Pipe*, 483 U.S. at 251-53.
American Trucking Associations v. Scheiner, 483 U.S. 266 (1987)	*Capitol Greyhound Lines v. Brice*, 339 U.S. 542 (1950); *Aero Mayflower Transit Corp. v. Bd. of R.R. Comm'rs*, 332 U.S. 495 (1947); *Aero Mayflower Transit Co. v. Georgia Public Service Comm'n*, 295 U.S. 285 (1935)	Significant retroactive liability at stake. Court remanded retroactivity issue to state court. *Scheiner*, 483 U.S. at 297-98. Retroactive liability later limited. *See American Trucking Associations v. Smith*, 110 S.Ct. 2323 (1990).
Healy v. Beer Institute, Inc., 491 U.S. 324 (1989)	*Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966)	No significant retroactive liability at stake—new state statute immediately challenged and invalidated.

[Source: Congressional Research Service: The Constitution of the United States of America: Analysis and Interpretation 2115-27 (1987 & Supp. 1990)]

Supreme Court, U.S.
FILED
DEC 20 1991
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(22)

No. 91-194

In The
Supreme Court of the United States
October Term, 1991

QUILL CORPORATION,
Petitioner,
v.

STATE OF NORTH DAKOTA,
BY AND THROUGH ITS TAX COMMISSIONER,
HEIDI HEITKAMP,
Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF NORTH DAKOTA .

BRIEF FOR THE STATE OF NEW MEXICO AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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December 20, 1991

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No. 91-194

In The
Supreme Court of the United States
October Term, 1991

QUILL CORPORATION,
Petitioner,
v.

STATE OF NORTH DAKOTA,
BY AND THROUGH ITS TAX COMMISSIONER,
HEIDI HEITKAMP,
Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF NORTH DAKOTA

BRIEF FOR THE STATE OF NEW MEXICO AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE

The State of New Mexico files this brief as *amicus curiae* in support of Respondent and urges the affirmance of the decision below. Like the other 45 States imposing sales tax, New Mexico continues to suffer a substantial loss of tax revenues as a consequence of *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967). True to Justice Fortas' prediction that "this haven of immunity may well increase in size and importance," *id.* at 764 (Fortas, J.

dissenting), it was estimated in 1986 that New Mexico lost up to $23 million a year in taxes on mail order sales.[1] Massive technological changes in the direct marketing industry now permit laser-like targeting of computer-segmented markets and the seductive ease and immediacy of electronic response and payment. No corporeal salesman could be this good. These changes have enormously increased the "economic presence"[2] of direct marketers in every State.

In response, many States have enacted so-called "expanded nexus" statutes. These statutes enumerate a variety of activities as indicia of "economic presence" sufficient to satisfy due process and justify making direct marketers collect and remit use tax. The application of North Dakota's extended nexus statute to the Quill Corporation has resulted in this litigation.

The North Dakota Supreme Court's decision below brilliantly explicates just how thoroughly this Court has eroded the underpinnings of *National Bellas Hess*. Subsequent decisions have overturned the commerce clause interpretation upon which that decision was based, *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), and have expanded the kinds of activities deemed sufficient to satisfy the due process requirement of nexus, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985). No longer does the commerce clause hold interstate commerce immune from nondiscriminatory State tax. No longer does due process bar a State from taxing companies, like Quill, that exhibit undisputable "economic

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[1]Advisory Commission on Intergovernmental Relations, *State and Local Taxation of Out-Of-State Mail Order Sales* (1986).

[2]The Court in *D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 33 (1988), recognized the significance of "economic presence" in determining nexus for taxing authority.

presence" by conducting millions of dollars of business annually within that State. Justice VandeWalle's eloquent and incisive decision says it all. It speaks for all the States. New Mexico fully supports Respondent and its *amici*.

New Mexico writes separately because it has taken a different approach to taxing direct marketing sales. While other States have focused narrowly on overturning *National Bellas Hess* by showing sufficient economic presence of direct marketers to impose *use* tax, New Mexico has broadened the scope of inquiry to include the issue of who should be taxing the *sale* itself. This analysis has led New Mexico to situate mail order sales within the broader conceptual scheme of the Court's modern commerce clause doctrine and to impose its gross receipts tax, rather than its compensating use tax, on mail order sales. New Mexico's gross receipts tax regulation is set out in the margin.[3]

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[3]New Mexico's regulation governing mail order sales reads as follows:

G.R. Regulation 3(F):85 - MAIL ORDER SALES

An out-of-state mail-order or direct-marketing seller who regularly ships goods to New Mexico customers is engaging in business in New Mexico and shall pay gross receipts tax on receipts from all sales which occur in New Mexico.

The place where a sale occurs shall be determined under the provisions of the Uniform Commercial Code (UCC). UCC Section 2-106(1) [See Chapter 55, NMSA 1978] defines "sale" as consisting "in the passing of title from the seller to the buyer for a price." UCC Section 2-327(1) controls when title passes in a "sale on approval": "Under a sale on approval unless otherwise agreed . . . risk of loss and the title do not pass to the buyer until acceptance." A sale which permits the return of delivered goods within a certain time period if the customer is not fully satisfied even though the goods conform to the contract is a "sale on approval" under UCC Section 3-326. UCC Section 2-401(2) controls when title passes in an ordinary sale: "Unless otherwise explicitly agreed, title passes to the buyer at the time and place at which

New Mexico also writes to urge the Court to recognize the doctrinal simplification of the *Complete Auto* test implicit in its recent cases. Under the uniquely commerce-clause prongs of *Complete Auto*, a State's tax may not impose multiple or discriminatory burdens on interstate commerce and must be internally and externally consistent.[4] In practical application to transactional taxes, all of these aspects of the *Complete Auto* test are satisfied by answering two simple questions: 1) does the transaction taxed occur exclusively within the State, and 2) does the State equally tax local commerce for those transactions.

Locating the transaction taxed and answering these two questions inform New Mexico's approach to taxing mail order sales. Under Uniform Commercial Code provisions common to forty-nine States, the location of a mail order sale lies within the purchaser's State when the purchaser accepts the goods. UCC Sections 2-106(1), 2-236 and 2-327(1). Prior to acceptance, the goods remain the property of the direct marketer. Thus, the sale to a New Mexico customer occurs in New Mexico and

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the seller completes his performance with reference to the physical delivery of the goods. . . . If the contract requires delivery at [the] destination, title passes on tender there." Mail order sales generally require delivery to the customer at the customer's location.

Notwithstanding the above standard for determining where the sale occurs, if the seller's state determines for any reason that a particular sale occurred in the seller's state and was subject to sales tax in that state which the seller has paid and not had refunded, that sale shall not be subject to gross receipts tax in New Mexico.

[4]The second and third prongs of *Complete Auto* forbid state taxes that discriminate against interstate commerce and are not fairly apportioned so as to subject interstate commerce to multiple taxation. *Complete Auto*, 430 U.S. at 279. See footnotes 6 and 13, *infra*. The internal and external consistency tests are discussed in *Goldberg v. Sweet*, 488 U.S. 252, 261-262 (1989). See footnote 10, *infra*.

New Mexico taxes the sale.

New Mexico bases its taxing jurisdiction on the reality of the marketplace—the commercial relationship between direct marketer and customer. We believe this approach, upon which the North Dakota Supreme Court reserved judgment, provides a more comprehensive analysis of State taxation of direct market sales than focusing on the collection of use tax. For New Mexico to impose its use tax would imply, incorrectly, that the sale has occurred elsewhere. The direct approach of taxing the sale, itself, is at once more consistent with the Court's recent commerce clause interpretation and more closely tied to traditional due process standards of permitting States to impose tax in return for protecting a taxpayer's property. New Mexico's interest in filing this *amicus* brief is to encourage the Court in its decision in *Quill* to provide a definitive resolution of the entire issue of State authority to tax mail order sales.

SUMMARY OF ARGUMENT

The dormant commerce clause no longer renders sales in interstate commerce immune from State taxation. The four-prong *Complete Auto* test can be simplified when applied to transactional taxes: a State may tax any transaction in interstate commerce occurring exclusively within that State so long as it taxes the same transactions by local businesses equally and fully. Mail order sales are thus subject to sales tax in the State where the sale occurs. The demand for certainty in commercial relations has created uniform rules under the Uniform Commercial Code specifying that a mail order sale—a "sale on approval"—occurs when the purchaser accepts the goods. This means that the sale takes place in the receiving State and that the mail order company retains ownership of the goods within

the receiving State up to the time of acceptance. The mail order company's ownership of property in the receiving State provides sufficient nexus under both the due process and commerce clauses for the receiving State to exert its judicial and taxing jurisdiction over the mail order company for the sale. The receiving State complies with the dormant commerce clause requirement of equal treatment for interstate commerce by taxing out-of-state mail order sales equally with local sales.

ARGUMENT

I. IMPOSITION OF SALES TAX, RATHER THAN USE TAX, BY THE STATE IN WHICH THE MAIL ORDER SALE OCCURS COMPLIES WITH ALL DORMANT COMMERCE CLAUSE LIMITATIONS.

A. The Court's Modern Interpretation of the Commerce Clause Permits a State to Tax Any Transaction Occurring Within the State Provided the State Taxes Local Commerce for Those Same Transactions Equally and Fully.

Quill Corp. v. North Dakota presents the Court with an excellent opportunity to place the capstone on its modern commerce clause doctrine with regard to State taxation of interstate sales. Starting with *Western Live Stock v. Bureau of Revenue*[5] and culminating in *Complete Auto*[6], the Court has

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[5] 303 U.S. 250 (1938). *Western Live Stock* marked the beginning of the Court's clear statement that interstate commerce was subject to taxation just like any other form of commerce.

> It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business. "Even interstate business must pay its way."

Id. at 254.

[6] *Complete Auto* cemented the final abandonment of the various formulations that interstate commerce was a free trade zone with its famous four-prong test sustaining a tax "when the tax [1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State." 430 U.S. at 279.

[7] *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 298 (1851); *Robbins v. Shelby Taxing District*, 120 U.S. 489 (1897).

[8] *Freeman v. Hewit*; *Wiloil Corp. v. Pennsylvania*, 294 U.S. 169 (1935).

[9] State income taxation of multistate and multinational businesses raises different considerations of apportionment not present with transactional taxes due to the ability to isolate in time and place the location of a transaction in

developed a modern commerce clause analysis that treats interstate commerce equally with local commerce. In *Complete Auto*, the Court ended years of wavering by definitively rejecting the line of cases permitting interstate commerce to enjoy a free-trade immunity from State taxation. *See, e.g., Freeman v. Hewit*, 329 U.S. 249 (1946). In doing so, the Court abandoned such fine distinctions as interstate vs. local sales[7] and direct vs. indirect burdens on interstate commerce.[8]

In interpreting and applying its modern standard in *Complete Auto* over the last 15 years, the Court has distilled to a high degree of conceptual clarity the two simple, essential conditions imposed by the dormant commerce clause on State transactional[9] taxes. These conditions permit States to tax *any*

activity in interstate commerce so long as 1) the State taxes only those activities that occur exclusively within the State, and 2) the State taxes local commerce equally with interstate commerce on those activities. Transactions in interstate commerce meeting these conditions are preserved from discriminatory and multiple taxation. The Court's developing articulation of these two conditions is reflected in its discussions of the internal and external consistency tests.[10]

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interstate commerce.

[10]*See Goldberg v. Sweet*, 488 U.S. 252, 261-262 (1989); *American Trucking Association, Inc. v. Scheiner*, 483 U.S. 266, 284-286, 303 (1987); *Armco, Inc. v. Hardesty*, 467 U.S. 638, 644 (1984). Allowing States to tax only those transactions occurring within the State provides external consistency. "The external consistency test asks whether the State has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed." *Goldberg v. Sweet*, 488 U.S. at 261. Requiring the states to tax local commerce equally with interstate commerce, without credits or refunds given elsewhere, provides internal consistency. Formulating the internal consistency test as whether the tax is "structured so that if every State were to impose an identical tax, no multiple taxation would occur," *id*, forces supposition and concern about whether "actual discriminatory impact" must be shown. *See Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, 483 U.S. 232, 257 (Scalia, J. concurring and dissenting). The real issue is whether the taxing State, itself, taxes local commerce equally. If it does not because of credits or exemptions given local commerce for some other tax paid, then its tax on the interstate transaction is directly and actually discriminatory, without reference to any hypothetical taxing behavior of other States.

1. Taxing Only In-State Activities Prevents Multiple Taxation.

By taxing only those activities that occur within the State,[11] and by measuring the tax by the extent of those activities,[12] every possibility of multiple taxation is avoided and no apportionment is needed. Because States have mutually exclusive territory, no other State can tax the activity occurring within the taxing State.

The Court in *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, 483 U.S. 232 (1987), explicitly recognized that isolating the in-state activity taxed renders apportionment unnecessary. The Court noted that it was impossible for Washington's wholesaling tax to cause a multiple tax burden because it was imposed on an activity occurring

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[11]*Complete Auto* (transportation within the state); *Moorman Mfg Co. v. Blair*, 437 U.S. 267, 280-281 (1978) (gross receipts tax on sale to customers within the state would be "plainly valid"); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 617 (1982) (severance of coal within the state); *Wardair Canada, Inc. v. Florida Department of Revenue*, 477 U.S. 1 (1986) (sale of aviation fuel within the state). *Goldberg v. Sweet* is the exception that proves the rule, where the entire service was *not* in the taxing state. The Court sustained the tax because the complexity of interstate telephone technology prevents apportionment of the tax among the states through which a call is routed and rerouted, which otherwise would prevent full and equal taxation of the interstate telephone call, and because Illinois limited its tax to those calls originating or terminating in Illinois and charged to an Illinois service address, precluding multiple taxation except in a few circumstances where a credit was provided.

[12]Measuring the tax by the extent of the activity within the state avoids the potential multiple tax burden inherent in a flat tax, *American Trucking Association, Inc. v. Scheiner*, satisfies external consistency, and meets the elusive fourth prong of *Complete Auto*. *See*, *Commonwealth Edison v. Montana*, 453 U.S. at 628-629.

solely within Washington. Tyler had asserted that the Washington tax on the full value of the wholesale transaction was impermissibly unapportioned because "the wholesale transaction is partly attributable to manufacturing activity carried out in another State that plainly has jurisdiction to tax that activity." *Id.* at 251. The Court pointed out Tyler's error:

> This apportionment argument rests on the erroneous assumption that through the B & O tax, Washington is taxing the unitary activity of manufacturing and wholesaling. We have already determined, however, that the manufacturing tax and wholesaling tax are not compensating taxes for substantially equivalent events . . . . *Thus, the activity of wholesaling—whether by an in-state or an out-of-state manufacturer—must be viewed as a separate activity conducted wholly within Washington that no other State has jurisdiction to tax.*

Id. (emphasis supplied). Justice Scalia in his concurring and dissenting opinion in *Tyler Pipe* shared this perception. Where a State taxes "discrete events such as sale, manufacture or delivery, which can occur in a single State or in different States, [the] apportionment principle is not applicable." *Id.* at 256. The discrete event can be taxed only in the single state of its occurrence. To the same effect is the Court's quotation of the lower court in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 617 (1981) upholding Montana's severance tax on coal: "'the severance can occur in no other state' and 'no other state can tax the severance.'"

Such focus on the discrete, in-state transaction being taxed avoids the need for apportionment and the risk of multiple

taxation, meeting the fair apportionment prong of *Complete Auto*. It also meets the nexus prong[13] of *Complete Auto* since the occurrence within the taxing State of the transaction, itself, necessarily ensures nexus.

2. Taxing Interstate and Local Commerce Equally for the Same In-State Activities Prevents Discriminatory Taxation

Requiring States to tax interstate and local commercial activity equally, without credits or rebates on any other tax on

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[13] The nexus prong of *Complete Auto* is really a due process requirement rather than one stemming from the commerce clause. Its derivation appears to be from two concurring opinions by Justice Rutledge quoted in *Complete Auto*. First, from *Freeman v. Hewit*, 329 U.S. 249, 271 (1946): "In his view, a state tax is unconstitutional only if the activity *lacks the necessary connection with the taxing state to give 'jurisdiction to tax,'* ... or if the tax discriminates against interstate commerce, or if the activity is subject to multiple taxation." *Complete Auto*, 430 U.S. at 281-282 (emphasis added). Second, from *Memphis Natural Gas Co. v. Stone*, 335 U.S. 80 (1948): "'[I]t is enough for me to sustain the tax imposed in this case that it is one clearly within the state's power to lay *insofar as any limitation of due process or "jurisdiction to tax" in that sense is concerned.'*" *Complete Auto*, 430 U.S. at 282. (Emphasis added.)

The Court has recognized that the nexus analysis is the same under the due process clause and the commerce clause. See, *Amerada Hess Corp. v. Director, Division of Taxation*, 490 U.S. 66, 79-80 (1989):

> First, appellants recognize that the *Complete Auto* test encompasses due process standards. . . . Accordingly, having determined that the Corporation Business Tax passes all four prongs of the *Complete Auto* test, we also conclude that it does not violate due process.

The nexus requirement as to direct marketing sales is further discussed in Part II, below.

local commerce, ensures against discriminatory taxation of interstate commerce. This meets the third prong of *Complete Auto*. Both *Armco, Inc v. Hardesty*, 467 U.S. 638 (1984), and *Tyler Pipe* illustrate instances where a State effectively gave local commerce a discriminatory advantage. In *Armco*, West Virginia's tax on selling at wholesale exempted local manufacturers who had paid a manufacturer's tax. In *Tyler Pipe*, Washington's tax on manufacturers exempted those who sold their product at wholesale and paid the wholesaler's tax. Both denied tax exemptions to interstate businesses which may have paid manufacturing or wholesaling tax to another State. The Court wisely rejected the discriminatory taxes in those cases.

A State can tax any activity relating to interstate commerce, such as manufacture, warehousing, sale or transportation of goods within the State, so long as it equally taxes those same activities in local commerce. Interstate commerce is automatically protected from excessive taxation because whatever taxes are imposed on interstate commerce must also be imposed on local commerce.[14] If a State wants to tax the warehousing of goods passing through the State in interstate commerce, for instance, it must also tax the warehousing of local goods. Political pressure from local taxpayers will inevitably inhibit excessive taxation. A State will be unlikely to separately and cumulatively tax each stage of local business activity (manufacture, warehousing, wholesaling, retailing) just so the State will be able to tax whichever single aspect of an interstate business occurs within the State. Conversely, if a State does choose to require local business to pay tax at several

[14]The only exception is for the compensating use tax imposed on property acquired outside a state but used within it, because it functions entirely as a complement to the state's sales tax. *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937); *see also, Maryland v. Louisiana*, 451 U.S. 725, 758-759 (1981).

separate levels of business activity, it is not discriminatory to require interstate business also to pay tax at each of those levels, albeit to different States for the different business activities located in such States. It was thus acceptable to the Court in *Tyler Pipe* to have Tyler pay wholesaling tax in Washington and manufacturing tax in the States of manufacture.

These two simple limitations on State transactional taxes—taxing only those activities within a State and taxing local businesses equally for those activities—satisfy the minimum requirements of the dormant commerce clause by guaranteeing equal treatment of interstate commerce.

B. Mail Order Sales Occur When the Purchaser Accepts the Product in the Receiving State Pursuant to Uniform Commercial Code Provisions Common to Forty-Nine States, Fully Justifying Imposition of the Receiving State's Sales Tax.

This focus on the discrete activity taxed plainly guides the correct analysis of taxation of mail order sales. For years the approach of mail order sellers has been to pretend that the sale occurs no place, not in the sending State and not in the receiving State. During the era in which the Court sheltered interstate commerce as a free-trade area, immune from State tax, this position made sense. Under the Court's current interpretation, however, such a position is revealed for what it is, a convenient method to evade taxation. Indeed, from *Western Live Stock* on, the foundation of modern commerce clause analysis has been that interstate commerce should no longer be preferred over local commerce but must pay its fair share of taxes. This means that the mail order sale, itself, should be subject to tax, once, like any other sale. The only real issue is where.

The "where" is answered by focusing on what is being taxed—the sale—and determining where that sale occurs. The State in which the mail-order sale occurs has jurisdiction to impose its sales tax. The Court has long relied upon a determination of where a sale occurs to judge the constitutionality of State sales taxes in the face of a commerce clause challenge. *See*, *McGoldrick v. Berwind-White Coal Co.*, 309 U.S. 33 (1940) (sales transaction took place in New York; New York's tax upheld); *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327 (1944) (sales transaction took place in Tennessee; Arkansas' sales tax struck down); *American Oil Co. v. Neill*, 380 U.S. 451 (1965) (sales transaction in Utah; Idaho not permitted to tax). The State of sale alone can impose its sales tax. No multiple taxation can ever occur.

By referring to the location of the sale, the Court would not be basing taxation on some arcane legal technicality, but rather on the vital necessity to clarify a crucial detail of the basic commercial transaction. The demands for certainty in commercial relations has long preceded tax decisions in laying down clear rules for when title and risk of loss pass in a sales transaction. Precisely when a sale occurs must be specified to protect the interests of buyer and seller. Forty-nine States, including New Mexico, have for many years accepted the same statutory rules in the Uniform Commercial Code (UCC) specifying where a sale occurs.[15] Numerous State courts have recognized the usefulness of this common standard and have referred to UCC provisions to determine the time and place of sale for tax purposes.[16]

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[15]Only Louisiana has not adopted the UCC.

[16]See, *Arga Co. v. Limbach*, 522 N.E.2d 1074 (Ohio 1988); *H.O. Anderson, Inc. v. Rose*, 352 S.E.2d 541 (W.Va. 1988); *Associated Milk Producers, v. Indiana Department of State Revenue*, 512 N.E.2d 917 (Ind. 1987); *United Technical Corp. v. Department of Revenue*, 438 N.E.2d 535 (Ill.App. 1982); *City of Richmond v. Petroleum Marketers, Inc.*, 269 S.E.2d 389 (Va. 1980); *First Coinvestors, Inc. v. Coppola*, 88 Misc.2d 495, 388 N.Y.S.2d 833 (1976); *Crown Iron Works Co. v. Commissioner of Taxation*, 214 N.W.2d 462 (Minn. 1974).

Under the Uniform Commercial Code, a sale occurs when title passes. UCC §2-106(1). The typical mail order sale is specially defined in the UCC as a "sale on approval"— a sale where delivered goods may be returned to the buyer even if they "conform to the contract." UCC §2-236(1)(a).[17]

The very essence of direct marketing is the right of the purchaser to reject conforming goods. A direct marketer's guarantee to take its merchandise back if, for any reason, the customer is not satisfied is one of the keystones of successful direct marketing. The "free trial period" has been described as the "bellwether of mail order. [It m]elts away human inertia." *See*, Stone, *Successful Direct Marketing Methods* (3d ed.), p. 48. This guarantee of full refund upon return for any reason has been described as follows:

> No matter what the terms or basic offer may be, a strong guarantee is essential when selling products or services direct. For more than 90

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[17]UCC §2-236(1)(a) states in pertinent part:

> Unless otherwise agreed, if delivered goods may be returned by the buyer even though they conform to the contract, the transaction is:
>
> a. A "sale on approval" if the goods are delivered primarily for use.
>
> b. A "sale or return" if the goods are delivered primarily for re

> years, Sears, Roebuck and Company has guaranteed satisfaction for every article offered. Over the years, no one else has ever succeeded in mail order operations without duplicating the Sears guarantee or offering similar assurances.
>
> The importance of the guarantee is perhaps best understood by recognizing a negative fact of life. It is this. Over 90 years after Sears first established its ironclad guarantee, it is still a fact of human nature that one is hesitant to send for merchandise unless one knows that the product may be returned for full credit if it does not meet expectations. Guaranteed satisfactions should be the part of any offer soliciting direct sales.

Id. at p. 65. Indeed, Quill provides its customers with just such a guarantee of satisfaction.[18]

UCC §2-237(1) specifies when title and risk of loss pass in a "sale on approval," which determines where the sale takes place.

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[18]Quill's catalog makes the following offer to its customers:

> Use any product from Quill in your office FREE for 30 days. During that time, try it, inspect it, use it . . . just to be sure you're satisfied with the product. You have no reason to pay us and can return it during that period for any reason . . . no questions asked . . . and we'll give you a full credit against your invoice.

Quoted in the decision below, *State of North Dakota v. Quill Corp.*, 470 N.W.2d 203, 217, fn 13 (N.D. 1991).

> Under a sale on approval unless otherwise agreed . . . risk of loss and the title do not pass to the buyer until acceptance.

The Official Comment to §2-236 amplifies:

> A "sale on approval" or "sale or return" is distinct from other types of transactions with which they have been confused. The type of "sale on approval," "on trial" or "on satisfaction" dealt with involves a contract under which the seller undertakes a particular business risk to satisfy his prospective buyer with the appearance or performance of the goods in question. *The goods are delivered to the proposed purchaser but they remain the property of the seller until the buyer accepts them.* The price has already been agreed. The buyer's willingness to receive and test the goods is consideration for the seller's engagement to deliver and sell.

(Emphasis added.) Thus, the actual *sale* of mail order goods does not occur until the purchaser receives the property at his home or business in the receiving State and decides to accept it.

By recognizing that ordinary commercial practices will determine where a sale occurs, and by tying the incidence of tax to that determination, the Court accomplishes two things. First, it achieves certainty. The sale occurs at an identifiable time and place under the UCC rules, or under whatever alternative arrangements are explicitly agreed to by the parties. This bright line certainty in locating the sale makes absolutely clear that the State in which that sale occurs can tax it without violating the two conditions for validity under the commerce clause.

Second, this approach interferes as little as possible with normal marketplace decisions. By using these standard commercial rules that permit the intent of the parties to determine where the sale occurs, the parties can best identify and protect their interests.[19]

C. Direct Marketers Can Easily Eliminate Any Alleged Undue Burden of Collecting Use Tax for Many Separate Sales-Tax Jurisdictions If They Are Simply Willing to Pay Tax on the Sale to a Single Jurisdiction.

Using standard commercial rules also allows direct marketers to gain needed flexibility to simplify their tax situation. Currently, because direct marketers do not specify otherwise as to where title and risk of loss pass, UCC provisions control, locating the mail order sale in the receiving State. But what if the mail order seller were to specify otherwise? Pursuant to UCC provisions, a direct marketer retains the option to contract that its sales occur in the *sending* State by requiring that title pass upon delivery to ("f.o.b.") the common carrier in the sending State. The result would be that

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[19]It has been suggested that the problem with allowing the parties to specify where the sale occurs is that they will arbitrarily select a jurisdiction—perhaps the moon—that will insulate the sale from tax. This "problem" is a rather silly strawman. First, it is unrealistic to believe that this Court would tolerate gross manipulation of the terms of a sale contract untied to some aspect of the transaction itself. Second, pretending that the sale occurs on the moon ultimately makes no difference. The result would be the same as where a direct marketer specifies that the sale occurs in a sending State that imposes no sales tax. In either instance, if the *sale* is not taxed, the receiving State can impose the obligation to collect and remit *use* tax on the direct marketer, for all the reasons so cogently articulated by the North Dakota Supreme Court below.

the sending State would have jurisdiction to impose its sales tax on the mail order sale.[20] The direct marketer would pay tax to a single jurisdiction—its home State—on all its sales.[21]

This option would allow Quill and other direct marketers to avoid what has long been touted as their major complaint: the burden of paying tax to some 6100 separate sales tax jurisdictions. *See Amicus Curiae* Brief of the Direct Marketing Association, pp. 16-23; *National Bellas Hess*, 386 U.S. at 759-760. Petitioner and its *amici* still raise this "undue burden on interstate commerce" as their prime reason to reaffirm *National Bellas Hess*.[22] Surely, today, this "undue burden" complaint has been nullified by the enormous advances in modern computer technology. Available software will automatically figure and prepare returns for all tax jurisdictions. Furthermore, direct marketers with retail locations in many States have for many years shown their ability to report and pay

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[20]*State Tax Commission of Utah v. Pacific States Cast Iron Pipe Co*, 372 U.S. 605, 606 (1963)("a State may levy and collect a sales tax, since the passage of title and delivery to the purchaser took place within the State" even though the property was immediately transported out of the State.)

[21]Where the seller's State taxes a mail order sale, the receiving State will not. It cannot impose its sales tax because the sale has not occurred in the receiving State. *McLeod v. J.E. Dilworth*, 322 U.S. 327 (1944). It will not impose a duplicative compensating use tax because almost every State gives a use tax credit for sales tax paid to other States. *See Williams v. Vermont*, 472 U.S. 14, 21-21 (1985).

[22]Interestingly, the burden of filing tax returns in each of the jurisdictions in which one does business has never been part of the *Complete Auto* test. The second prong concerns only fair apportionment to avoid multiple tax, not multiple tax returns. Interstate businesses have always been required to comply with the laws of each jurisdiction in which they choose to do business. When a fledgling direct marketer choses to do business in every State and county, it must be responsible to comply with the laws of each.

the appropriate tax rates for mail order sales to each State. Finally, as pointed out in Respondent's brief, the actual number of relevant tax jurisdictions is closer to 192.

But if direct marketers really are concerned about the burden of paying different tax rates to many separate jurisdictions, their option to pay a single tax rate to the sending State on all sales eliminates that concern. At least the concern is eliminated for those mail order companies genuinely worried about "undue burden" and not simply about undoing the burden. One suspects, however, that this solution is not the result that the direct marketers want. One suspects they want to pay no tax at all on their sales. To find out their true position, one can hardly ask for a nicer litmus test than the availability of this option to pay tax to a single jurisdiction. It provides the Court an easy way to uncover whether the direct marketers object to the burden of paying tax to too many jurisdictions or the burden of paying tax even to one.

New Mexico's proposed analysis does not eliminate the need to resolve the "economic presence" issue. Several States have no sales tax and others exempt out-bound sales from tax. Direct marketers from those States may be tempted to specify that title passes in the sending State, not in order to pay a single jurisdiction's tax, but in hopes of paying no tax. Were they to do so, the receiving State would then be fully entitled to impose its use tax, as North Dakota does now, on these mail order sales for all the reasons argued by Respondent and its *amici*.

The essence of modern commerce clause analysis is that interstate commerce shall not be specially advantaged, that it shall not be immune from nondiscriminatory State taxes. The proper result is not necessarily to have a *particular* State tax the mail order sale, but simply to be clear that *one* State is authorized to tax each mail order sale in order to level the

playing field for local merchants in the receiving State who are subject to their State's sales tax. The objectives of the commerce clause are achieved. Interstate commerce is neither specially benefitted nor unduly burdened.

Under current practices and in the case at bar, direct marketing sales transactions occur in the receiving State, supporting imposition of its sales tax. New Mexico believes that by taxing the sale, itself, rather than seeking to impose the obligation to collect and remit use tax, it achieves a more comprehensive resolution of the issue within the Court's modern commerce clause doctrine. It also reveals a very traditional answer to the due process requirement of nexus, to which we now turn.

II. THE PRESENCE OF THE DIRECT MARKETER'S PROPERTY IN THE RECEIVING STATE PROVIDES THE DUE PROCESS NEXUS FOR THAT STATE TO IMPOSE SALES TAX ON THE DIRECT MARKETER FOR SALES OF ITS PROPERTY IN THAT STATE.

Does the nexus requirement of the due process clause prevent the receiving State from taxing a direct marketer for sales delivered to purchasers in the receiving State or from requiring a direct marketer to collect and remit the use tax imposed on the purchaser by the receiving State?

The Court has long recognized the legal principle that the presence in a State of tangible property belonging to a taxpayer provides nexus for that State to impose tax on that property and on transactions related to that property. *D.H. Holmes Co. Ltd. v. McNamara*, 486 U.S. 24 (1988); *National Geographic Society v. California Board of Equalization*, 430 U.S. 551, 559, (1977); *Curry v. McCanless*, 307 U.S. 357, 363 (1939); *Frick v. Commonwealth of Pennsylvania*, 268 U.S. 473, 492-494

(1925); *Union Refrigerator Transit Co. v. Kentucky*, 199 U.S. 194, 204 (1905)("It is also essential to the validity of a tax that the property shall be within the territorial jurisdiction of the taxing power."). As the Court put it in *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344-345 (1954) "due process requires some definite link, some minimum connection, between a State and the person, property or transaction it seeks to tax." Does the direct marketer have property within the receiving State? Does the sales transaction of that property occur within the receiving State?

Under the UCC provisions cited above, mail order goods sold to New Mexico residents by an out-of-state direct marketer remain the property of the seller until acceptance by the purchaser. For the period of time those goods are within the receiving State——while being delivered over its highways, stored at the common carrier's warehouse and awaiting approval at the residence or business of the purchaser——these goods remain the property of the direct marketer until the purchaser accepts them. Sometimes the purchaser does not accept them. If a shirt does not fit, for instance, or its color displeases, it can be returned for full refund. And it is returned without title ever having transferred to the purchaser. In either case, the seller and its property receive the benefits of the civilized society the receiving State provides—police and fire protection, roads, etc. These goods, and transactions involving these goods, have nexus aplenty with the receiving State in the most traditional sense of the concept. *D.H. Holmes Co.*; *Miller Bros.*.

National Bellas Hess never reached this issue. The Court described the facts of that case by citing language from the State Supreme Court decision: "'[National] . . . does not own any tangible property, real or personal, in Illinois'". *National Bellas Hess*, 386 U.S. at 754. The Court apparently assumed on the basis of the stipulated facts that the transfer of title

occurred in the sending State upon delivery of the goods to the common carrier. This may have been a correct assumption if the sales contract so provided. But the Court in *National Bellas Hess* did recognize a "sharp distinction . . . drawn between mail order sellers with retail outlets, solicitors *or property within a State* and those who do no more than communicate with customers in the State by mail or common carrier as a part of a general interstate business." *Id.*, at 758. (Emphasis supplied.) Direct marketers do have property in the State—the goods sold—under UCC standards. They argue that this language refers to some property of the seller *other* than the goods sold. But that makes no sense. Surely the most appropriate basis supporting nexus for taxing jurisdiction is the presence within the State of the very property subject to the tax.

North Dakota can certainly answer an unqualified "Yes!" to the "'simple but controlling question . . . whether the State has given anything for which it can ask return.'" *National Bellas Hess*, quoting *Wisconsin v. J.C. Penney Co.* at 311 U.S. 435, 444 (1940). North Dakota provides the civilized society that creates a market for Quill's products and actually protects those products within North Dakota while they remain under Quill's ownership until acceptance by the purchasers, or until return to Quill. North Dakota does, in fact, keep Quill's property safe from fire, theft, plague, civil strife and highwaymen.

CONCLUSION

The North Dakota Supreme Court decision irrefutably explains why North Dakota can constitutionally impose on Quill the obligation to collect and remit use tax. But the use tax issue arises only if the State of sale has not imposed its sales tax. Under statutory provisions common to virtually every State, the

mail order sale actually takes place in the receiving State. That State may, as New Mexico does, impose its sales or gross receipts tax on that mail order sale. The location of the sales transaction in the receiving State fully satisfies the requirements of the due process and commerce clauses.

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HEIDI HEITKAMP,

Respondent.

On Writ Of Certiorari To The Supreme Court Of The State Of North Dakota

BRIEF AMICUS CURIAE OF THE MULTISTATE TAX COMMISSION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether a state may require an out-of-state retailer, whose direct sales into the state are facilitated and benefitted by the state, to collect its use tax?

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On Writ Of Certiorari To The Supreme Court Of The State Of North Dakota

BRIEF AMICUS CURIAE OF THE MULTISTATE TAX COMMISSION IN SUPPORT OF RESPONDENT

INTEREST OF THE AMICUS CURIAE[1]

The Multistate Tax Commission ("MTC") is the administrative arm of the Multistate Tax Compact (the "Compact"). ALL ST. TAX GUIDE ¶701 *et seq* (Max. Mac. 1991); ST. TAX GUIDE ¶351 (CCH 1991). Nineteen States, including the District of Columbia, have adopted the Compact. In addition, fourteen states are associate members. The Compact seeks to facilitate proper determinations of state and local tax liability of multistate

[1] Counsel for Petitioner and Respondent have consented to the filing of this *Amicus Curiae* Brief. Their letters of consent have been filed with the Clerk of the Court.

taxpayers, promote uniformity or compatibility of state tax systems, facilitate taxpayer convenience and compliance, and avoid duplicative state taxation. Article I, Compact, ALL ST. TAX GUIDE ¶701 (Max. Mac. 1991), ST. TAX GUIDE ¶351 (CCH 1991). The Court recognized the validity of the Compact in *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452 (1978).

As described in further detail in Part III.C of this Brief, the Commission, through its "uniformity" process, its National Nexus Program, and ongoing discussions of coordination and uniformity issues with direct marketers and their trade association, has been directly involved in the issue of collection of sales and use taxes by interstate direct marketers. The Commission expects these activities to continue and expand as additional state legislatures adopt laws like the North Dakota law at issue here, in response to the growth of the direct marketing industry and its increasing share of retail sales in each state. By eliminating artificial distinctions among competing, functionally equivalent marketers, affirmance of the decision below will help to accelerate the process of coordination and cooperation among the states, and between states and taxpayers, which the Commission seeks to foster.

INTRODUCTION AND SUMMARY OF ARGUMENT: "THAT WAS THEN AND THIS IS NOW"

To a lay observer, the thought that a small out-of-state retailer with one travelling salesman visiting North Dakota would have to collect North Dakota taxes on all its North Dakota sales, but that Quill Corporation – with a thousand employees,[2] over three thousand customers in

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[2] QUILL SEMI-ANNUAL OFFICE PRODUCTS CATALOGUE, Nov. 1991-April 1992, at 363 (hereinafter "QUILL CATALOGUE"). Copies

(Continued on following page)

North Dakota, and 24 tons of catalogues and a million dollars worth of products sent into the state in a year[3] – would not have to collect any North Dakota tax from its customers, might seem absurd.

To some direct-mail marketers, that anomaly is worth attempting to cast in constitutional concrete. It gives them a distinct competitive advantage over fellow direct mailers with multistate physical presence, and over all local marketers, who must collect state tax on their over-the-counter sales. In support of their position, they invoke a single case, *National Bellas Hess, Inc., v. Illinois*, 386 U.S. 753 (1967), repeating its words at every opportunity, in hopes that repetition will lend substance to their proposition that in-state physical presence is a constitutionally necessary condition for tax jurisdiction, even though it is not necessary for most other types of jurisdiction. *See, e.g., Burger King v. Rudzewicz*, 471 U.S. 462 (1989).

The legal response to their claim is not complicated:

1. *Bellas Hess* is the product of a different legal era when "the Commerce Clause was thought to prohibit the States from imposing any direct taxes on interstate commerce. [Citations omitted]. Consequently, the distinction between intrastate activities and interstate commerce was crucial to protecting the States' taxing power." *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 614-15 (1981). *See Goldberg v. Sweet*, 488 U.S. 252, 265 n.16 (1989).

(Continued from previous page)

of all catalogues cited have been lodged with the Clerk, and selected excerpts are contained in the Appendices. See *Bellas Hess*, 386 U.S. at 761, n. 2 (Fortas, J., dissenting).

[3] *North Dakota v. Quill Corp.*, 470 N.W.2d 203, 204, 218 (N.D. 1991); Appendix to the Petition for Writ of Certiorari at A2, A34 (hereinafter "Pet. App.").

2. In *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977), the Court "renounced the formalistic approach" of its earlier cases, and decided instead "to avoid formalism and rely upon a 'consistent and rational method of inquiry [focusing on] the practical effect of a challenged tax.' " *Trinova Corp. v. Michigan Dept. of Treasury*, 111 S. Ct. 818, 828 (1991) (quoting *Mobil Oil Corp. v. Vermont*, 445 U.S. 425, 436-7 (1980)) (brackets in original). Since 1977 there has been no constitutional bar to state taxation of interstate commerce as long as it meets the four-prong test of *Complete Auto*.

3. Subsequent cases have driven home the obsolescence of *Bellas Hess*. *Goldberg v. Sweet* distinguished *Bellas Hess* and applied the *Complete Auto* test to sales of interstate communications services into a state, finding the test satisfied where the sales were billed or paid in the state. *Goldberg*, 488 U.S. at 263. The *Goldberg* holding applies *a fortiori* to the facts here: sales of tangible goods into a state. In *Trinova*, the Court emphasized the "value added" by sales into a state, and found jurisdiction to tax such value not because of, but in spite of, a minuscule physical presence of the seller in the state. *Trinova*, 111 S. Ct. at 830, 833-834.

4. Here, as in *Goldberg*, 488 U.S. at 254, the change in legal environment is complemented and fueled by a change in the technological environment, symbolized by the change in basic concept from "mail order" to "direct marketing," and facilitated by the universal availability of toll-free "800" numbers, inexpensive computers, overnight express service, computerized selective mailing lists, and bank credit cards.

These legal points are treated in scholarly detail in the briefs of North Dakota and its other *amici*, who collectively demonstrate that the *Complete Auto* tests are met here with flying colors. The Multistate Tax Commission

will not duplicate their arguments. Instead, the Commission, a hands-on body of state tax administrators which deals with the practical realities of state tax policies and procedures, will focus its attention on the plea for equitable relief to which Petitioner and its allies, perhaps anticipating the strength of the legal arguments against them, appear to retreat.

In essence, Quill argues that it should not be subject to North Dakota's tax laws because it doesn't get much benefit from North Dakota. The fact is that Quill has so many contacts with the state, and every other state it sells into, that the Court could avoid confronting the obsolescence of *Bellas Hess*, by finding enough of what Petitioner calls "chimerical" presence,[4] to meet the facial standards of that case. Even apart from the catalogues and packaging and waste from its products strewn all over its customers' states, Quill has direct presence in each state, as shown in Section I below. It maintains in-state agents to set up equipment and service computers. It leaves its computer software in the hands of its customers, and it checks their credit through local banks. The fact that even Quill can be found to meet this supposed "bright line" test of physical presence, notwithstanding its efforts to remain isolated by eschewing "800" numbers[5] and, until recently, by refusing credit card sales from North Dakota, demonstrates why the test is meaningless, and why the Court should not rely on it to affirm the decision below. A decision on this narrow basis would merely postpone the inevitable and deprive the states and the direct marketing industry of definitive guidance based on the practical

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[4] Brief for Petitioner at 46 n. 43, *Quill Corp. v. North Dakota, cert. granted*, 60 U.S.L.W. 3257 (U.S. October 7, 1991) (No. 91-194) (hereinafter "Pet. Br.").

[5] Pet. Br. at 4.

realities of direct marketing in the United States in the 1990's, and the predictable expansion of the industry in the years ahead. Quill's most important presence in North Dakota is its economic presence, not its computer disks or its repair people, and the case should be decided on that basis.[6]

Quill's fallback equity argument is that compliance with North Dakota's use tax law would be too much of a burden. This argument requires the Court to believe that the direct marketers, who are at the frontier of computerized demographic research and data manipulation, using the most advanced database and telecommunications equipment and software to identify, contact, and sell to tens of millions of carefully selected Americans, are unable to keep track of 47 states' sales tax rates.

It should reassure Quill and the Court to know that the task of collecting multiple state taxes, which so frightens the Quills of the world, is one to which large numbers of its fellow direct marketers have accommodated. Moreover, the states, through the Multistate Tax Commission and individually, are just as anxious as the direct marketers to simplify and coordinate their tax collection activities. While these implementation issues are not of constitutional magnitude, Quill and the Court may also be comforted to know that this cooperative process

---

[6] The principle that sellers from afar who want to exploit the local market must bear their share of local taxes is not a new one. It was recognized in ancient Jewish law: "In the Talmudic discussion, the ruling was quite clearly that foreign and out-of-town merchants cannot be excluded, provided that they pay the local taxes." M. Tamari, IN THE MARKETPLACE: JEWISH BUSINESS ETHICS 55 (1991). Tamari notes that "Non-payment of taxes gives the competitor an advantage which cannot be duplicated by the local merchants, no matter how efficient or cost-conscious they are." *Id.* at 61.

has already begun between the states and marketers who now collect state taxes in multiple states.

Quill's ultimate defense is to assert that the principle it reads into *Bellas Hess* is subject to revision only by Congress. We show below that Congress, by both action and inaction, has signaled the opposite conclusion: this Court has the authority and responsibility to review and, if appropriate, revise its own decisions, especially where its prior statements are the source of serious conflicts.

Quill wants to have all the benefits of exploiting the North Dakota market without bearing any of the burdens. Exempting Quill from the well accepted business responsibility of assisting in sales and use tax collection would be unfair to the state and its taxpayers and unfair to Quill's competitors who do assist the state. Such an exemption is neither required nor justified by the Constitution, by this Court's precedents, or by federal law. North Dakota's legislature and Supreme Court acted reasonably and lawfully in rejecting such an exemption and their actions should not be disturbed.

ARGUMENT

I. THE PRACTICAL EFFECT OF A PHYSICAL PRESENCE RULE WOULD BE TO ENSHRINE INEQUITABLE DISTINCTIONS AND ENCOURAGE AVOIDANCE OF TAX COLLECTION RESPONSIBILITIES

The general economic benefit from the "value added" by Quill's North Dakota sales, *Trinova Corp.*, 111 S. Ct. at 830, and from its exploitation of the state's "civilized society", *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940), is more than sufficient to meet a constitutional nexus test. But the list of Quill's direct contacts with, burdens on, and benefits from North Dakota dramatizes why no reasoned distinction can be made between Quill

and either the local merchants or competing direct marketers who happen to have sales agents or other physical presence in the state. Quill's "presence" includes:

> – the wear and tear on North Dakota's roads and the additional truck traffic and air pollution attributable to the delivery of 24 tons of catalogues and a million dollars worth of (frequently heavy) office supplies,
>
> – the police and fire protection for the goods in transit into and within the state,
>
> – the disposal of the huge volume of catalogues and many thousands of packages and wrappings containing the delivered goods,[7]
>
> – the availability of North Dakota courts and collection agencies to collect overdue bills,
>
> – protection of Quill from unfair competition of unscrupulous marketers of office products by the consumer protection, law enforcement, and licensing agencies of North Dakota,
>
> – submission by Quill to North Dakota's jurisdiction in respect to any applicable laws on usury, fair credit practices, prohibited sales, fraud, antitrust, warranties, limitations of liability, environmental protection, and food quality,[8]

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[7] Pet. App. at A34.

[8] For examples of such limitations in other states, *see* J.C. PENNEY CATALOGUE, Fall and Winter 1991, at 750 (enumerating Ohio restrictions on credit, Wisconsin notice regarding credit obligations incurred by spouses, Hawaii notice of state credit sale law). *See also* VA. CODE ANN. § 46.2-1079 (1991) (prohibiting use or sale of radar detectors). *See also Burger King v. Rudzewicz*, 471 U.S. 462, 476 (1985) ("it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines thus obviating the need for physical presence within a State in which business is conducted").

> – the use of the state's banks to obtain credit references on customers,[9]
>
> – the use of VISA and Mastercard accounts at local banks to establish immediate credit,[10]
>
> – the provision of " 'inside delivery' or 'carry-in with setup' " services at extra cost,[11]
>
> – for purchasers of computers, continuing technical support by telephone and "free on-site service" for one year after purchase,[12]
>
> – the leasing of computer software to North Dakotans, allowing them to access Quill's computer,[13]
>
> – the use of demographic information and databases gathered in-state to generate solicitation lists.[14]

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[9] Quill's current order form asks new customers desiring to be billed to provide "Bank Name, Bank Phone #, Bus.[iness] Checking Account #, Person to Contact". QUILL CATALOGUE at 361.

[10] QUILL CATALOGUE at 361. Although it appears from the record that Quill for a time discriminated against North Dakota customers by denying them the use of credit cards, its current catalogue contains no such restriction.

[11] *Id.* at 365.

[12] *Id.* at 204.

[13] Pet. App. at A29.

[14] Direct marketers access lists segmented into a dizzying array of lifestyle, life-event, demographic, geographic, and previous purchasing characteristics. Direct Marketing magazine each month carries an annotated listing of newly available lists, numbering anywhere from 25-30 entries and encompassing market segments ranging from "Texas Liberals" ("file contains 33,398 . . . Texas residents who have contributed to the campaign of Gov. Ann Richards and other democratic candidates"), *New List Bank*, 54 DIRECT MARKETING 1, May 1991 at 63, to the "Portable Technology Database" ("last 12 months buyers' list contains 26,397 names at $100 [per thousand

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The fact is that most of this list would apply to every direct marketer who substantially enters the North Dakota market, whether or not it has a store, an agent, a warehouse, or an office in the state. These are not factors which show that Quill is unique in having the requisite presence. Rather they show generically why "direct marketers" are exactly what their self-selected name implies, marketers who enter the local markets massively and directly to do from a distance, with economies of scale and modern telecommunications, precisely what local marketers do in person: make sales to local citizens. A rule which ignores this purposeful and pervasive economic presence and focuses exclusively on physical presence no matter how slight or how separate from the target of the tax, or which depends on a case by case weighing of discrete contacts, will merely perpetuate a tax dichotomy based on no functional difference.

Quill obviously cares about its customers, offering them its own "Bill of Rights."[15] But its customers have no

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names]. These top corporate officers are large volume buyers of portable computers.") *New List Bank* 53 DIRECT MARKETING 12, April 1991 at 56. The effort to add names of potential consumers can start on the day of their birth. *See* Miller, *Data Mills Delve Deep to Find Information About U.S. Consumers*, Wall St. J., March 14, 1991, at A-1. Raw name lists can then be enhanced and sorted by zip code, income level, residence rates and social position. See Advertisement, 54 DIRECT MARKETING 6, October 1991 p. 15. For those, like Quill, selling mainly to businesses, lists are available by discrete business type (e.g. dishwashing machine dealers), size of business (e.g. sales volume, number of employees) or new business entries updated through telephone directories, and can be sorted on a nationwide or individual state basis. See AMERICAN BUSINESS INFORMATION: LISTS OF 9 MILLION BUSINESSES (January 1991).

[15] QUILL CATALOGUE at 363.

right to avoid payment of their state's sales or use taxes, when they order office furniture shipped from manufacturers in Michigan, Florida, California, New Jersey, Delaware, or Tennessee[16], whether they order it from Quill by phone, fax, or mail, or from another direct marketer who sends a salesman to drop catalogues and take orders, or from a local office supply store.[17] Quill's exemption from the use tax laws would not only place Quill at an unfair competitive advantage over its in-state and out-of-state rivals who collect the state's tax, it would force these competitors and their customers to generate the tax revenues to pay for the state's direct and indirect contribution to Quill's profit-making activity in the state.

Quill and its *amici* argue that a physical presence rule is desirable, if not required, because it offers a purportedly "bright-line" test. Even putting aside the fact that litigation all over the country demonstrates that the present line is murky at best,[18] what the "physical presence"

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[16] QUILL CATALOGUE at 291, 308-309.

[17] See *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359, 366 (1941) (" . . . respondent is in no position to found a constitutional right on the practical opportunities for tax avoidance which its method of doing business affords Iowa residents").

[18] *Compare Boswell v. Paramount Television Sales, Inc.*, 282 So. 2d 892, 893, 896-897 (Ala. 1973) (lease of films sufficient nexus to out-of-state lessor) *with Cally Curtis Co. v. Groppo*, 572 A.2d 302, 303, 306 (Conn.), *cert. denied*, 111 S. Ct 77 (1990). *Compare L.L. Bean, Inc. v. Department of Revenue*, 516 A.2d 820, 823, 825-826 (Pa. Commw. Ct. 1986) (state visits by customer service representatives sufficient) *with Proficient Food Co. v. New Mexico Taxation and Revenue Department*, 758 P.2d 806, 807, 808-809 (N.M. Ct. App. 1988). *Compare Good's Furniture House, Inc. v. Iowa State Board of Tax Review*, 382 N.W. 2d 145, 146-147, 150 (Iowa) *cert. denied*, 479 U.S. 817 (1986) (noting local advertising as a significant link) *with Book-of-the-Month Club, Inc. v. Porterfield*, 268 N.E. 2d 272, 274 (Ohio 1971) (local advertising insufficient to establish nexus).

test does is invite "formalistic" gaming of the system to avoid state tax responsibilities. For example, Saks & Company, the parent of the Saks Fifth Avenue retail stores throughout the nation, conducts its mail order activities through a corporate subsidiary with physical presence only in New York and California. Its "Saks Fifth Avenue Folio" mail-order catalogues are intimately connected with its store operations.[19] Nevertheless it continues to resist collecting use tax anywhere outside those two states. If the Court does not update *Bellas Hess*, Saks Fifth Avenue may continue to find itself on different sides of the line in different states.[20] On the other hand, if this Court affirms the North Dakota decision, Saks Fifth Avenue Folio will collect any appropriate taxes from all its customers, just as its stores do. The fact that Saks Fifth Avenue might not continue to attract some customers who wish to escape state tax is not an argument for maintaining the status quo. *See, e.g. Nelson v. Sears Roebuck & Co.*, 312 U.S. 359, 366 (1941). It is, rather, evidence of the unfair advantage some sellers currently enjoy, and an argument for changing the status quo. Surely any interpretation of the commerce or due process clauses which encourages or assists tax avoidance, fosters

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[19] Each item lists the store department where it can be purchased, except for certain items which are listed as not available at stores or at all stores. Saks Fifth Avenue Folio accepts Saks Fifth Avenue credit cards, uses Saks' New York City office for certain mail, and, as is clear solely from the catalog cover, exploits the Saks name and good will. See SAKS FIFTH AVENUE, FOLIO: RESORT 1991 at 4, 50, Order Form following p. 46.

[20] *Compare SFA Folio Collection, Inc. v. Bannon*, 585 A.2d 666 (Conn. 1991), *cert. denied*, 111 S. Ct. 2839 (1991), *with SFA Folio Collection, Inc. v. Huddleston*, No. 89-3015-III (Tenn. Ch. App. March 11, 1991).

unfair competition between sellers of the same goods to the same customers, and erects barriers to expansion of sellers' physical facilities into other states should not be endorsed by this Court.

II. COLLECTING STATE USE TAXES IS NOT AN IMPERMISSIBLE BURDEN ON COMMERCE; IT IS A NORMAL BUSINESS FUNCTION WHICH QUILL NOW PERFORMS FOR THREE STATES, AND MANY OTHER CATALOGUE SELLERS PERFORM FOR MANY MORE STATES.

Petitioner and its numerous *amici* complain that the "burden" they would have to bear if they are subject to North Dakota's use tax law would cause "economic chaos," Pet. Br. at 9, and drive mail order companies out of business. Brief of *Amicus Curiae* Direct Marketing Association at 16, *Quill Corp. v. North Dakota, cert. granted*, 60 U.S.L.W. 3257 (U.S. October 7, 1991) (No. 91-194) (hereinafter "DMA Br."). Their claim echoes this Court's concern 24 years ago that collection of taxes for multiple states would draw mail order companies into a bookkeeping morass. *Bellas Hess*, 386 U.S. at 759-760. But neither the commerce clause nor due process guarantees immunize businesses from all "burdens" in the states whose economies they are exploiting. On the contrary, this Court has said that " '[i]t was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business.' "[21]

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[21] *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 623-624 (1981) (quoting *Colonial Pipeline Co. v. Traigle*, 421 U.S. 100, 108 (1975) quoting *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938)).

Even if "burden" were a triggering mechanism which invokes the commerce or due process clauses,[22] or a factor in a "weighing" process with "contacts", Pet. Br. at 7, in today's business environment this case does not raise a serious "burden" issue. For the fact is that the additional procedures which the decision below requires of Quill and others who are resisting their state tax collection responsibilities are ones which many of their competitors and fellow multistate marketers have long accepted.

The Court's pre-*Bellas Hess* decisions in *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359 (1941) and *Nelson v. Montgomery Ward*, 312 U.S. 373 (1941), established fifty years ago the requirement of tax collection from catalogue customers by those with local retail outlets. In 1944, Justice Frankfurter, who was quite concerned about the administrative burdens on taxpayers,[23] upheld Iowa's requirement that out-of-state sellers without local offices, warehouses, or general agents collect its use tax, and said, "to make the distributor the tax collector for the State is a familiar and sanctioned device." *General Trading Co. v. Iowa*, 322 U.S. 335, 338 (1944).[24] The decision fifteen

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[22] This appears to be the argument of at least one of Petitioner's *amici*. *See, e.g.* Brief *Amici Curiae* of American Council for the Blind et al. at 22, *Quill Corp. v. North Dakota, cert. granted*, 60 U.S.L.W. 3257 (U.S. October 7, 1991) (No. 91-194).

[23] See *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 474 (1959) (Frankfurter, J., dissenting).

[24] Justice Frankfurter thought that the existence of retail stores in-state in *Sears* and *Montgomery Ward* was "constitutionally irrelevant", *General Trading*, 322 U.S. at 338, and placed no particular emphasis on the fact that General Trading used travelling salesmen to solicit orders filled from out-of-state. In this pre-*Complete Auto* case, the dissent said that the holding was "that a state has the power to make a tax collector of one whom it has no power to tax." *Id.* at 339 (Jackson, J. dissenting).

years ago in *National Geographic v. California Board of Equalization*, 430 U.S. 551 (1977), confirmed that local presence of any type is a sufficient condition for tax collection responsibility. Thus, many direct marketers are fulfilling these tax collection responsibilities in multiple states today, without "economic chaos" and without being driven out of business. In fact, Quill itself is collecting use taxes for the three states in which it has facilities. QUILL CATALOGUE at 361.

MTC's review of over 150 recent catalogues (selected randomly but unscientifically), discloses at least 33 which require buyers in 15 or more states to remit use tax, including 9 which call for remittance of tax for all 47 states (including D.C.) with use taxes. See Appendix A. Another 30 of these catalogues collect taxes for 3 or more states, as does Quill. Among those who collect for only one or two states are such large, well-known marketers as Saks Fifth Avenue Folio, and L. L. Bean. *Id.* Justice Frankfurter's "familiar and sanctioned device" is thus already part of the normal business environment for many interstate marketers, and there is no showing that those who have so far avoided it are any less capable of fulfilling this obligation than those who are meeting it now.

Some of Petitioner's *amici* complain that they would be forced to use costly catalogue space to inform customers of their tax obligations.[25] Quill's own order form, typical of the middle ground used by many multistate marketers, rebuts that argument. It merely has a small

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[25] *See, e.g.* DMA Br. at pp. 18-20; Brief of Amicus Curiae Coalition for Small Direct Marketers at 19, *Quill Corp. v. North Dakota, cert. granted* 60 U.S.L.W. 3257 (U.S. October 7, 1991), (No. 91-194).

space in its computation form for "State Sales Tax", and in an effort to be helpful to its customers, lists the tax rate in each of the three states where Quill has facilities. Quill Catalogue, at 361. Some direct sellers assume that their customers know the tax rates in their own states, and merely instruct them to "add applicable state sales tax". *See e.g.*, LORD & TAYLOR: SIGNATURE SAVINGS, Order Form following p. 34 (1991). Others list the states in which tax is due, *e.g.* GREENPEACE CATALOG, Order Form following p. 8 (1991-1992) (listing 34 states), *see* App. B, or the states which do not have sales taxes. *E.g.*, EDDIE BAUER: ALL WEEK LONG, Order Form following p. 24 (1991). Some give additional information to assist the customer in calculating the tax. *See, e.g.*, BARRIE PACE, LTD.: WINTER SALE 1991, Order Form following p. 24 (1991) (clothing exemptions); HARRY AND DAVID: 1991 HOLIDAY BOOK OF GIFTS, ORDER FORM FOLLOWING P. 18 (1991) (FOOD EXEMPTION); BUSINESSLAND, POWERFUL PRODUCTS POWERFUL SOLUTIONS, Order Form following p. 130 (1991) (instructing exempt companies to include their tax exempt certificate with their order). Sears does not list any tax rates, but instructs customers to call its "800" number to obtain calculation of shipping and handling charges and taxes. SEARS at 950B (Spring/Summer 1991). At the other extreme, J.C. Penney provides a comprehensive set of instructions: on its chart of shipping information and return centers for each state, it also lists the state sales tax rate, and other state-specific information relevant to Penney merchandise (e.g. "omit tax on footwear and clothing"). J.C. PENNEY, FALL & WINTER 1991 at 742, *see* App. C. The entire tax listing adds one column to the six other columns on the chart.[26]

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[26] Although not at issue in this case, Petitioner repeatedly invokes its apprehension at the prospect of complying with

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Of course, like Sears, most sellers have phone agents who will compute the state tax and shipping charges, or check the customer's computation, when the order is taken or while the customer is filling out an order form. Businessland, for example, offers to "confirm" the computation for the customer. See BUSINESSLAND, *supra*, Order Form following p. 130. Just as Quill informs its customers that "shipping charges, if applicable, will be added to your total" by Quill (QUILL CATALOGUE at 361), Penney tells its customers that overpayment of sales taxes will be refunded, that late changes in taxes will be reflected in a corrected invoice, and that on credit orders, "we'll figure the tax and add it to your account." J.C. PENNEY, *supra* at 741.

Each of these marketers has made its own market-driven decision on how much space, detail, and help to provide for this purpose. But the fact is that a marketer who collects tax in all or most states can, if it wishes, meet the need with no more order blank space than Quill

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myriad local sales tax laws. As with state tax collections, different direct marketers have chosen different ways to deal with this issue. J.C. Penney, for example, notes to its customers the states in which there are such taxes and leaves it to the customer to apply them. *See* App. C. As noted below, if a marketer wished, it could use modern computer printing technology to print local tax instructions on each catalogue cover or order blank. In any event, this concern will be addressed in the first instance by the marketers themselves, by state and local tax authorities, and if disputes arise, by the state courts. Only if some issue of constitutional moment arises will it reach this Court. Certainly it should not be decided here in the first instance, as a hypothetical matter and without a record.

now provides. Moreover, the phone agents, who answer questions about hundreds or thousands of catalogue items and prices and shipping rules, have no difficulty answering questions about a state's tax rates. Whether they look at Penney's chart or type a zip code into their computers, the information can be readily available.

Similarly, the claim that accounting for many states' taxes would be beyond the bookkeeping capacity of a direct marketer like Quill is frivolous. The large direct marketers keep track of hundreds of thousands of customers, orders, and items in stock on large computers. They use the most sophisticated technologies to identify the most desirable demographic targets for their wares, and to decide how many and which catalogues to send them.[27] They buy, sell, sort, and refine huge mailing lists, and compare them to individualized data bases with detailed information on each prospective customer.[28] Many already personalize the order forms in their catalogues with ink-jet printed names and addresses of the recipient,[29] and could undoubtedly add state-specific information on sales taxes if they wished.[30]

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[27] *See* Egol, *Personalized Production*, CATALOG AGE, October 1991 at 78. *See also* discussion n. 14, *supra*.

[28] *Id*.

[29] As the "P" column in App. A indicates, the vast majority of the catalogues reviewed by MTC contained personalized order forms.

[30] It is now fairly common for mass magazines to contain computer generated inserts containing the name of the subscriber and localized information such as the location of the nearest store of a national chain. *See, e.g.*, TIME, Nov. 18, 1991, insert following p. 55, containing personalized message with name of subscriber and location of nearest Radio Shack. "At

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In fact, Quill prides itself on its sophisticated computer capacity. Its "integrated order fulfillment system," based on a 700 terminal "Unisys 110/1200 mainframe," provides its operators with "instant on-line access to customer files and product information, . . . [and] credit checking. . . . It determines which . . . warehouse will handle the shipment and generates detailed picking instructions for each order, complete with carton size and weight." It offers same-day shipment for orders received by 4 p.m., and as soon as the personal computer at the warehouse detects from the bar code on each package that an order has been shipped, it signals the mainframe to generate an invoice the same day.[31] Clearly, for Quill, going from 3 states to 47 will not be a significant problem.[32]

Even for the smaller direct marketer, computers capable of calculating and keeping track of tax receipts and payments are readily available and inexpensive. At the time of *Bellas Hess*, it was probably still true, as Senator Keating said in discussing Pub. L. No. 86-272,[33] that "[s]mall firms simply cannot afford the electronic gadgets now used by giant corporations for such purposes." 105 CONG. REC. 16,362 (Aug. 19, 1959). Now a fast, large

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present, Fingerhut uses its merchandising/publishing system to version [sic] its outer wraps based on the customer's geography," to accommodate each state's "credit rules that have to be expressed differently." Egol, *supra* note 27.

[31] Smith, *The New Frontier*, DIRECT MARKETING, September 1991 at 37.

[32] It is interesting to note that part of Quill's product line includes tax forms. QUILL CATALOGUE at 362.

[33] See discussion Part III, Section B. *infra*.

capacity personal computer which did not even exist in 1967 can be purchased by mail from Damark for $899.99, monitor and basic software included.[34] Several well reviewed business accounting programs can be purchased for under $100, and more sophisticated programs for under $300.[35] Even if a marketer sets up its own sales tax record-keeping system on a simple spreadsheet program for its own state, the cost of adding additional states after the first one is literally nil for hardware and software. It takes only a few minutes' time per state to copy the initial spreadsheet and substitute each additional state's tax rate.

Whether for large direct sellers with large computers and large numbers of sales in each state, or smaller sellers with small computers and small numbers of sales in most states, this is hardly an issue of constitutional significance. As more marketers collect for more states the task can only get easier, for the software providers (after designing programs to meet the needs of their own direct mail sales) will compete to offer these programs at low cost to all comers. Almost every direct marketer must have some system for collecting and remitting sales and use taxes for at least one state now. It is hardly a burden at all, let alone a burden of constitutional proportions, to

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[34] Damark Advertisement, USA Today, Dec. 6, 1991 at 5b ("In MN add 6.5% sales tax").

[35] *See, e.g.*, Peachtree Accounting Advertisement, PC MAGAZINE Dec. 31, 1991 at 254 (offering accounting package with multiple taxation feature for $298); Software Add-Ons Advertisement, PC MAGAZINE Dec. 31, 1991 at 431 (listing several accounting programs retailing for as little as $29). One such program, Pacioli 2000, provides capability for creating up to 1000 different sales tax codes. PACIOLI 2000 USER'S MANUAL at 127 (1990).

require that, as they and their markets grow, their responsibility for collecting state use taxes grow as well.

III. CONGRESS, RATHER THAN PREEMPTING COURT OR STATE ACTION BY ITS INACTION, HAS LEFT THE FIELD TO THE STATES AND THIS COURT.

Petitioner argues that the states are precluded from enacting legislation like North Dakota's, and that the Court is precluded from allowing them to do so, because of what Petitioner seems to think is Congress' exclusive responsibility to define the scope of state tax powers. Petitioner quotes approvingly a commentator's statement that "making state tax law . . . is best left to Congress". Pet. Br. at 45 n. 40. Fortunately for the nation's federal system, that view is not reflected in the Constitution, the acts of Congress or the opinions of this Court. Making state tax law is best left to the states. The Tenth Amendment says so. U.S. Const. amend. X. And this Court has repeatedly said so. *See, e.g., Trinova*, 111 S. Ct. at 836; *Moorman v. Bair*, 437 U.S. 267, 279-80 (1978); *Wisconsin v. J.C. Penney*, 311 U.S. 435, 445 (1940).

Bellas Hess was not a provision of the Constitution or a Congressional enactment. It was the Court's best interpretation of the Constitution's requirements given the surrounding constitutional and factual framework at the time. Whether or not the present members of this Court would have assessed the then prevailing facts and constitutional environment the same way as their predecessors did twenty-four years ago, the Court must decide the present case in the light of today's constitutional and factual context. Particularly in the field of state taxation,

the Court has never ceded to Congress the Court's constitutional responsibility to clarify and modernize prior case law. On the contrary, in such cases as *Complete Auto* and *Goldberg*, it has moved the law forward with the economic realities of business and technology.

A. This Court Has Made Clear That Congress Will Not Be Deemed To Pre-empt The States In The Absence Of Clear Legislative Pre-emption Or Complete Occupation Of The Field.

Petitioner cites no congressional enactment through which Congress in the exercise of its power over interstate commerce has directed the states or the Court to refrain from action in this field. Instead it cites Congress' failure to produce legislation on the subject of this case over the past six years. Pet. Br. at 35 n. 26.

But the silence of Congress, at least in the absence of a comprehensive legislative framework inherently occupying the entire field, is not a barrier to state action or to this Court's action. In *Puerto Rico Department of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 504 (1988), this Court said "preemption, if it is intended, must be explicitly stated." There cannot be "a preemptive grin without a statutory cat." *Id.* The Court demands "clarity and manifestness", *id.* at 500, before it will find that Congress intended to supersede the powers of the states. Thus, in the absence of some affirmative action by Congress, the states are free to do whatever the Court finds is not barred by some constitutional constraint.

B. Congress' Conscious Exclusion Of Sales Taxes From Its 1959 Legislation On Out-Of-State Solicitation, Its Silence After Statutorily Mandated Studies In 1964-65, And Its Inaction Since 1985 On The *Bellas Hess* Issue Show That Action Here Must Come From The States And The Court

In general, Congress and the courts have historically recognized the importance to federalism of non-interference by the federal government with state taxing authority. *See California v. Grace Brethren Church*, 457 U.S. 393, 410-11 nn. 23, 24 (1982). As a matter of common law, comity, and long-held statutory policy, federal courts have refrained from interjecting themselves into the state tax enforcement process. *See e.g. Franchise Tax Board v. Alcan Aluminum Limited*, 110 S. Ct. 661 (1990); *California v. Grace Brethren Church*, 457 U.S. 393 (1982); *Rosewell v. LaSalle National Bank*, 450 U.S. 503 (1981). *See also* Tax Injunction Act, 28 U.S.C. § 1341. Of course, once state remedies have been exhausted, this Court has met its responsibilities to apply the constraints of the Constitution, but always with due respect for the proper role of the states in designing their own tax systems. *Trinova*, 118 S. Ct. at 836; *J.C. Penney*, 311 U.S. at 444.

Three times in the postwar years, Congress has examined the scope of state taxing power over interstate businesses. But rather than signifying a legislative decision to occupy the field or to pre-empt either state or Court authority, Congress' action each time shows that Congress itself has left the issue in this case to the states, subject only to the limits this Court may impose.

The Court has previously considered Congress' 1959 action on the state income tax implications of sales solicitations by out of state businesses. *See Heublein Inc. v.*

South Carolina Tax Comm'n, 409 U.S. 275 (1972); *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452 (1978). *See also Wisconsin Dept. of Revenue v. William Wrigley Jr. Company*, 160 Wis. 2d 53 (Wis. Sup. Ct. 1991), *cert. granted* 60 U.S.L.W. 3257 (U.S. October 7, 1991) (No. 91-119). In that year, after this Court's decision in *Northwestern States Portland Cement Company v. Minnesota*, 358 U.S. 450 (1959), a precursor of *Complete Auto Transit*, 430 U.S. 274 (1977), many large interstate businesses, correctly anticipating that the Court was heading towards eliminating its proscription of state taxes on interstate transactions, went to Congress for anticipatory relief. The result was Pub. L. No. 86-272, 15 U.S.C. § 381 *et seq.*, which prohibits imposition of state net income tax on corporations based solely on solicitation of orders in the state, where acceptance is outside the state. See *Heublein*, 409 U.S. at 280; *United States Steel Corp.*, 434 U.S. at 455.

It is clear from the text and legislative history of the statute that Pub. L. No. 86-272 did not apply to sales taxes because the framers of the statute intended that the states continue to have full authority to levy sales taxes in accordance with the Court's broadening view of state tax powers over interstate commerce.[36]

For the next sixteen years, Congress was aware of these issues but did nothing. As the Court later noted, Congress in 1959

> also authorized a study for the purpose of recommending legislation establishing uniform standards to be observed by the States in taxing

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[36] *See* 105 CONG. REC. 16,362 (1959) (colloquy between Senators Bush and Bennett).

> income of interstate businesses. Although the results of the study were published in 1964 and 1965, Congress has not enacted any legislation dealing with the subject. [Court's Footnote: "There have been several unsuccessful attempts." [citing bills in 1965, 1966, 1971, 1973, 1975, including post-*Bellas Hess* bills that covered sales tax issues]].

United States Steel Corp. v. Multistate Tax Commission, 434 U.S. at 455-6.

As Petitioner points out, Congress again took up the *Bellas Hess* issue beginning in 1985, and regularly thereafter. Pet. Br. at 35. But again there was no congressional action, despite the proliferation of so-called "anti-Bellas" state laws,[37] enforcement of those laws, increasing voluntary compliance with those laws,[38] and state court decisions construing them.[39] It should be pointed out that the same interests which now claim that the legislative branch is the only appropriate authority to act on *Bellas Hess* fought vigorously to prevent congressional action to close the *Bellas Hess* loophole during this period. In a massive lobbying campaign, they enlisted their catalogue

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[37] Brief of National Conference of State Legislatures *et al.* on Petition for Writ of Certiorari at 7 n. 6, *Quill Corporation v. State of North Dakota, cert. granted* 60 U.S.L.W. 3257 (U.S. October 7, 1991) (No. 91-194).

[38] Morse and Zimmerman, *Efforts to Collect Sales Tax on Interstate Mail-Order Sales, Recent State Legislation*, 12-13 and n. 35 (1990) (prepared for presentation to the National Conference of State Legislatures).

[39] *North Dakota v. Quill Corp.*, 470 N.W.2d 203 (N.D. 1991); *Bloomingdales By Mail Ltd. v. Huddleston*, No. 89-3017-II (Ch. App. March 21, 1991); *appeal filed* No. 01-SO1-9016-CH-0047 (Tenn. April 19, 1991); *SFA Folio Collection Inc. v. Huddleston*, No. 89-3015-III (Tenn. Ch. App. March 11, 1991).

customers to provide grassroots opposition to the pending legislation.[40] In fact, contradicting their present position that only Congress, and not the Court, can act to update *Bellas Hess*, their expert witness testified before the House Judiciary Committee in 1988 that Congress was precluded from acting because this Court had based *Bellas Hess* on the due process clause, over which Congress had no legislative authority, rather than solely on the commerce clause, over which Congress has "plenary power".[41]

This history leaves no doubt that Congress has not occupied the field of state taxation of interstate commerce, nor in any way preempted state or Court action in the field of state sales taxes. On the contrary, each of Congress' three ventures into this area have left the legal

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[40] *See Federal Report*, GOVERNING, at 24 (August 1989): The Direct Marketing Association " . . . held a summit meeting to plot strategy, and 300 companies contributed to a $1.5 million war chest, according to Robert Levering, vice president for government affairs of the Direct Marketing Association . . . . In addition 30 to 40 companies printed letters opposing the plan at their own expense and have begun inserting them in merchandise shipments to millions of customers." *Opposition to Sales Tax Idea Arrives in the Mail*, Baltimore Sun, April 2, 1989, at 1A, 14A.

[41] Testimony of Lucas A. Powe, Jr., on behalf of Direct Marketing Association and Magazine Publishers Association on H.R.1242 and H.R. 3521, *Interstate Sales Tax Collection Act of 1987 and the Equity in Interstate Competition Act of 1987: Hearing on H.R. 1242, H.R. 1981 and H.R. 3521 Before the Subcommittee on Monopoly and Commercial Law of the Committee on the Judiciary*, 100th Cong., 2d Sess. at 72 - 75 (1988): "The Court said, due process, and Congress cannot change due process decisions. Congress can change commerce clause decisions." *Id.* at 72.

landscape either untouched, or with a specific congressional statement that it did not intend to affect sales taxes.

Of course, if the Court affirms the decision below, and Congress wishes to address issues left open by the Court, or anticipate and resolve potential implementation issues, Congress can do so within the scope of its power over interstate commerce, as it did in 1959. *See*, Pub. L. No. 86-272. The possibility that Congress might some day act to improve on or supersede the Court's action, however, is no reason for the Court not to act at all, when faced with a clear constitutional controversy, especially one generated by its own prior ruling.

C. The States, Individually And Through Multistate Action, Have A Mutual Interest With Taxpayers In Implementing The Economic Presence Test Reasonably And Efficiently.

In such post-*Complete Auto* cases as *Trinova, Goldberg, and Amerada Hess Corp. v. Director, Div. of Taxation, New Jersey Dept. of Treasury*, 196 U.S. 66, 72 (1989), this Court has emphasized that it will not attempt to impose a particular tax formula on the states, even if that may result in minor inconsistencies and inconveniences to taxpayers. As long as the states are reasonable and nondiscriminatory in their tax structures, the Court will allow them to choose their own tax rates, rules, and procedures.

Of course the states have a shared interest in making their tax systems as compatible and convenient as possible, and they have done so frequently in the past. Through such mechanisms as the Multistate Tax

Compact,[42] which became effective in 1967, the Multistate Tax Commission, established by the signatories to the Compact, and the Uniform Division of Income for Tax Purposes Act, adopted as part of the Compact by its signatories, many states have demonstrated their interest in "promoting uniformity and compatibility in state tax systems" and "facilitating taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration."[43]

The MTC has already focused on the need for uniformity and consistency in the sales and use tax area. Through its "uniformity" process, proposals for multistate action to coordinate state sales and use tax laws and enforcement are developed, circulated for taxpayer and other public comment, and recommended by the full Commission for adoption by the states. *See* MULTISTATE TAX COMMISSION REVIEW, Vol. 1991, No. 1 at 21-22 (March 1991).[44]

In addition, twenty-six states have joined MTC's National Nexus Program, which began in December 1990.

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[42] Considered and upheld by the Court in *United States Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452 (1978).

[43] *United States Steel Corp.*, 434 U.S. at 456 (paraphrasing Multistate Tax Compact).

[44] The states have undertaken similar cooperative efforts to simplify compliance with state law in other fields. For example, the North American Securities Administrators Association and the National Association of Securities Dealers have jointly developed a Central Registration Depository which receives and processes state registration applications and fees for brokers and their representatives for all states. *See* NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., AN INTRODUCTION TO THE NASD, 13 (1990).

This multifaceted project provides assistance to states in securing taxpayer compliance and to taxpayers in complying with state tax laws. A key element is a central repository of information on the states' tax filing requirements. This information is available for distribution to any company that needs to determine the filing requirements in several states. Where taxpayers are concerned about potential past liability, the Program enables them to discuss their exposure and to fashion settlements anonymously, before they register.[45]

It is well known to the parties and many *amici* in this case that for the past year MTC and other state organizations have also been involved in discussions with the Direct Marketing Association and individual direct marketers in an effort to coordinate and simplify the administration of sales and use taxes, regardless of the outcome of this case. This Court's affirmance of the decision below would undoubtedly give new impetus to this process, which allows the industry as a whole to bring its concerns and suggestions directly to the responsible tax officials of a large number of states.

At the same time, affirmance will give clear guidance to the individual states as they update and conform their own statutes to accommodate developments in this Court, and thus make unnecessary what will otherwise be the continuing state experimentation with new ways to address the *Bellas Hess* problem. Although this Court need only decide the specific case presented to it – involving collection of one state's use tax – its analysis of

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[45] Davis, *The National Nexus Program: An Innovative Approach to Multistate Tax Compliance*, 1 STATE TAX NOTES, 450, 451 (Nov. 25, 1991).

North Dakota law, including the *de minimis* standard adopted by regulation, will substantially inform the other states' process of implementing the decision.

The Court can and should decide this case on the constitutional merits with assurance that it will be in the interest of each state, and of the states as a group, to identify and address sub-constitutional inconveniences which the Petitioner speculates may result from affirmance of the decision below.

IV. CONCLUSION

For the reasons stated herein, the decision of the Supreme Court of North Dakota should be affirmed.

Respectfully submitted,

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December 26, 1991

APPENDIX A

Catalogues Ranked By Number of States
for which Use Tax Is Collected
["P" indicates whether order forms are personalized]

# Jurisd.	Company	P.
47	All Week Long Eddie Bauer	Y
47	Businessland	N
47	Eddie Bauer Home	Y
47	Honeybee	Y
47	J.C. Penney	N
47	Laura Ashley	Y
47	Sears	N
47	Spiegel	Y
47	The Ultimate Outlet – Spiegel	Y
35	Victoria's Secret	Y
34	Greenpeace Catalog	N
34	Talbots	N
33	The Disney Catalog	Y
29	Godiva Direct	Y
27	Egghead Discount Software	Y
27	Sharper Image	Y
26	Coach	Y
25	Barrie Pace, Ltd.	Y
24	Williams-Sonoma	Y
23	Nature Company	Y
22	Brooks Brothers	Y
22	Carroll Reed	Y
22	Harry & David	Y
17	FAO Schwartz	Y
16	Bachrach by Mail	Y
16	Lord & Taylor	N
16	Neiman Marcus by Mail	Y
16	Pottery Barn	Y
15	Chambers	Y
15	Hold Everything	Y

14	Gardener's Eden	Y
13	REI	Y
12	Horchow	N
12	Rand-McNally	Y
10	Bloomingdale's By Mail Ltd.	Y
9	Care Package Catalog	N
9	National Wildlife	Y
9	Orvis	Y
9	Tiffany & Co.	N
8	Crate & Barrel	Y
8	Laurel Burch	Y
8	Unicef	Y
7	Nordstrom	N
6	J. Crew	Y
5	Clifford & Wills	Y
5	Global Computer Supplies	N
5	Just for Kids	Y
5	Metropolitan Museum of Art	Y
5	Performance Bicycle Shop	Y
5	Playclothes/Child Craft	Y
5	Sesame Street, The Catalog	N
4	Chelsea	Y
4	Day-Timers	Y
4	Diamond Essence	Y
4	Domestications	Y
4	Hammacher Schlemmer	Y
4	Land's End	Y
4	Land's End Kids	Y
4	Mark, Fore & Strike	Y
4	Night & Day	Y
4	Tapestry	Y
3	Bike Nashbar	Y
3	Community Kitchens	Y
3	MacWareHouse	Y
3	Quill	N
3	Ralieghs	N
3	Salvatore Ferragamo	N

3	Showcase of Savings	Y
2	After the Stork	Y
2	Bits & Pieces	Y
2	Brielle Gallaries	N
2	Brightscreek	Y
2	Exposures	Y
2	Grill Lover's Catalog	Y
2	Lillian Vernon	Y
2	Museum of Fine Arts	Y
2	Saks Fifth Avenue Folio	Y
2	Smythe & Co.	N
2	The Ben Silver Collection	Y
2	The Jewish Book Guide	N
2	The Right Start Catalogue	Y
2	Touch of Class Catalog	Y
2	Toys to Grow On	Y
2	Troll Learn & Play	Y
2	Tweeds	Y
2	World Wide Games	Y
1	Airline International	Y
1	Anticipations-Ross Simmons	Y
1	Aristoplay	N
1	Art Institute of Chicago	Y
1	Attitudes	Y
1	BILA	Y
1	Caly & Corolla	Y
1	Casual Living	Y
1	Christina Stuart	Y
1	City Spirit	Y
1	Claudia Christy	Y
1	Coldwater Creek	Y
1	DAK	N
1	Damark	Y
1	Down's	Y
1	Edgar B	N
1	Eximious	Y
1	Flax	Y

1	Fortune's Almanac	Y
1	Health Source	Y
1	Hearth Song	Y
1	Initials	Y
1	J. Jill Ltd.	Y
1	Jean Grayson's Brownstone Studio	Y
1	Jennifer Austin	Y
1	John Deere	Y
1	Keeping In Touch	Y
1	L. L. Bean	N
1	Lady Smith	Y
1	Lew Magram	Y
1	Lewis & Roberts	Y
1	Musuem of Modern Art	Y
1	Mystic Seaport Museum Stores	Y
1	Namark Funwear	N
1	Oriental Trading Co, Inc.	Y
1	Pepperidge Farm	Y
1	Play Fair Toys	Y
1	Pleasant Co. New Baby Collection	Y
1	Potpourri	Y
1	Scope	Y
1	Scully & Scully, Inc.	Y
1	Selfcare Catalogue	Y
1	Signals	Y
1	Source for Everything Jewish	Y
1	Sporty's	Y
1	Storybook Heirlooms	Y
1	Sundance	N
1	T. Anthony Ltd.	Y
1	The Anatomical Prod. Premier	Y
1	The Competitive Edge	Y
1	The Cottage Shop	N
1	The Mind's Eye	N

1	The Music Stand	Y
1	The Paragon	Y
1	The Personal Touch	Y
1	The Pet Catalog	Y
1	The Very Thing	Y
1	The Writewell Co.	Y
1	What on Earth	Y
1	Wintersilks	N
1	Wireless	Y
1	Wolferman's	Y
0	A.B. Lambdin	Y
0	CitiDollars	N
0	Garnet Hill	Y
0	Hanna Anderson	Y
0	Herrington	Y
0	Norm Thompson	Y
0	Solutions	N

Total Number of Companies: 155

APPENDIX B

EXCERPT FROM GREENPEACE CATALOG

Free With Every Order
Our Greenpeace bumper sticker lets the world know you care.



The Greenpeace Catalog
This catalog is produced under a licensing contract between Greenpeace USA and Winterland Productions. Winterland estimates that the contract will provide net proceeds to Greenpeace USA of over 50% of the available funds after product cost, sales tax, fulfillment costs, packaging, phone service, catalog production costs, returns, bad debts, mailing costs, etc. In addition to these funds, Greenpeace is pleased to be offering Greenpeace products for its supporters to involve and express themselves in Greenpeace's worldwide efforts.

Every item presented in this catalog is made to the highest quality standards. If you are dissatisfied for any reason, just return the item within 30 days for an exchange, credit or full refund. Fill in the enclosed return form and send your package, insured via UPS or Parcel Post (no C.O.D.'s accepted). We will do everything possible to handle your return quickly.

If you have questions about a product, about the status of your order or need the address of your nearest Greenpeace office, please call the Winterland Customer Service Department at 1-800-327-3223, Monday through Friday, 8:30 am to 6:00 pm (PST) Sept. 1-June 30, 1992. Saturday 8:30 am to 1:00 pm (PST) through Jan. 31, 1992, or write to our Customer Service Department at P.O. Box 77048, San Francisco, CA 94107-0048.

For Office Use Only

BATCH #	ORDER#	RECEIVED	INITIAL

Ordered By:

Daytime Phone ( ) - ( ) - ( )
Evening Phone ( ) - ( ) - ( )

PLEASE PRINT INFORMATION

Name

Address

City State Zip

Payment Method

❑ Check or money order enclosed (please no C.O.D.'s or cash). **United States currency only.**
❑ Charge to my account: ❑ American Express ❑ Visa ❑ Mastercard
NOTE: CHARGE RECEIPT WILL READ CCC FOR GREENPEACE

Account No. Expiration Date

Signature Required with all credit card purchases. Authorization No.

SHIP TO: If different from name and address at left.

Name

Address

City State Zip

INDICATE IF SHIP TO IS ❑ RESIDENTIAL ❑ COMMERCIAL.

Item Number	Color	Description	Page Number	Size	Size Category Adult/Youth/Infant	Quantity	Price Each	Total
7,4,0,5	BLK	(EXAMPLE) ENDANGERED RAINFOREST T-SHIRT	7	S	ADULT	3	$ 13.50	$XX,00

Free With Every Order *Our Greenpeace bumper sticker lets the world know you care.*

SHIPPING AND HANDLING:
If shipping to more than one address compute delivery charges for each address. Purchase Amount Per Shipping Address.

Continental U.S.	Fee
$0.00 to $25.00	$ 4.50
$25.01 to $50.00	$ 5.75
$50.01 to $100.00	$ 6.75
$100.01 to $200.00	$ 7.75
Over $200.00	$ 8.75

Poster (1 to 3 Units) Add. $ 1.50
Foreign Orders Add. $ 30.00

Check box for air.
❑ UPS Blue Label Add. $ 6.00
❑ Federal Express Standard Add. $ 9.00

Size Information
Adult sizes: Small (34-36), Medium (38-40), Large (42-44), Extra Large (46-48). Youth Sizes: Extra Small (2-4), Small (6-8), Medium (10-12), Large (14-16). Infant sizes: 12 mo. and 24 mo.
When In Doubt, Order One Size Larger.

Please Remember
1. Specify the style, size and color of each garment ordered, and whether Adult, Youth, or Infant size. **2.** Order only sizes and colors listed in the catalog. **3.** Include delivery charges (and sales tax where applicable). **4.** Make check or money order payable to CCC For Greenpeace (or fill in information requested for credit card charge.) **5.** Print your name and address in the corner of the return envelope. **6. This is the ONLY Greenpeace Catalog you will receive in the mail. Join us in our effort to conserve resources - save it for your orders through June 30, 1992 or recycle it to family and friends.**

***Add All Sales Tax For Delivery To:**
AL, AR, AZ, CA, CO, DC, FL, GA, IA, IL, IN, KS, KY, LA, MD, MI, MO, MS, NC, ND, NE, NM, NV, NY, OH, OK, SC, TN, TX, UT, VA, WA, WI, & WV

Call Toll-Free to Charge Your Order
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1-800-456-4629
24 hours a day, 7 days a week.

Please have your credit card handy and your order form filled in to read to the operator.

All mail orders for the Winter Holidays received in our office by December 2 and phone orders placed with our operators by December 5, will be shipped for arrival by December 20, 1991.

Subtotal	
*Applicable Sales Tax	
Shipping	
Add For Air	
Poster	
Foreign	
TOTAL	

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APPENDIX C

STATE	First 3 Digits of Zip Code	ZONE	Shipping Cost per lb	Minimum Cost per Class C Order	State Sales Tax Rates (page 741)	Customer Service/ Return Dist. Center*
AL	All Zips	II	48¢	60.00	4%, TR, LO	Atlanta
AK	See leaflet in this Catalog				0	Reno
AR	All Zips	II	65¢	80.00	4½%, TR, LO	Kansas City
AZ	All Zips	II	65¢	80.00	5%, LO	Reno
CA	962-966 (APO/FPO)	II	APO/FPO-Class A Merch. Only			Reno
	All Other Zips	*	65¢	80.00	5%, TR, LO	*
CO	All Zips	II	65¢	80.00	3%, TR, LO	Kansas City
CT	060, 061	I	42¢	64.00	8%, TR	Manchester
	All Other Zips	II	*	*	* * *	*
					(Omit tax on each article of footwear & clothing under $75, or clothing for kids under 10.)	
DE	All Zips	II	42¢	64.00	0	Manchester
DC	All Zips	II	42¢	64.00	6%	Manchester
FL	340 (APO/FPO)	II	APO/FPO-Class A Merch. Only			Atlanta
	All Other Zips	*	58¢	62.00	6%, TR, LO	*
GA	300,303	I	47¢	60.00	4%, TR, LO	Atlanta
	All Other Zips	II	*	*	* * *	*
Guam			See leaflet for Class A Rates			Reno
HI	See leaflet in this catalog for rates				4%, TR	Reno
ID	All Zips	II	65¢	80.00	5%, TR	Reno
IL	600-619	II	42¢	51.00	6¼%	Milwaukee
	All Other Zips	*	65¢	80.00	* *	Kansas City
IN	463-466	II	42¢	61.00	5%, TR	Milwaukee
	469, 478, 479	*	*	*	* *	*
	All Other Zips	*	42¢	65.00	* *	Columbus
IA	500-516, 525	II	65¢	80.00	4%	Kansas City
	All Other Zips	*	42¢	61.00	* *	Milwaukee
KS	662	I	32¢	43.00	5.85%†, TR	Kansas City
	All Other Zips	II	65¢	80.00	* *	*
KY	420-424	II	53¢	60.00	6%	Atlanta
	All Other Zips	*	44¢	65.00	*	Columbus
LA	700-708, 713, 714	II	55¢	60.00	4%, TR, LO	Atlanta
	All Other Zips	*	65¢	80.00	* * *	Kansas City
ME	All Zips	II	42¢	64.00	5%	Manchester
MD	215, 217	II	44¢	65.00	5%, TR	Columbus
	All Other Zips	*	42¢	64.00	* *	Manchester
MA	All Zips	II	43¢	61.00	5%, TR	Manchester
					(Omit tax on footwear & clothing.)	
MI	480-483	II	44¢	65.00	4%, TR	Columbus
	All Other Zips	*	42¢	68.00	* *	Milwaukee
MN	560, 561	II	65¢	80.00	6%, TR, LO	Kansas City
	All Other Zips	*	42¢	68.00	* *	Milwaukee
					(Omit tax on footwear & clothing.)	
MS	All Zips	II	53¢	60.00	6%, TR	Atlanta
MO	641	I	32¢	43.00	4.225%, TR	Kansas City
	All Other Zips	II	65¢	80.00	* *	*
MT	594, 596-599	II	65¢	80.00	0	Reno
	All Other Zips	*	*	*	*	Kansas City
NE	All Zips	II	65¢	80.00	5%, TR, LO	Kansas City
NV	894, 895	I	40¢	50.00	3½%, TR, LO	Reno
	All Other Zips	II	65¢	80.00	* * * *	*
NH	All Zips	II	42¢	64.00	0	Manchester
NJ	All Zips	II	42¢	64.00	7%	Manchester
					(Omit tax on footwear & clothing.)	
NM	All Zips	II	65¢	80.00	5%, TR	Kansas City
NY	090-098 (APO/FPO)	II	APO/FPO-Class A Merch. Only			Manchester
	140-143, 147	*	55¢	70.00	4%, TR, LO	Columbus
	All Other Zips	*	42¢	64.00	* * *	Manchester
NC	All Zips	II	49¢	60.00	3%, TR, LO	Atlanta
ND	All Zips	II	42¢	68.00	5%, TR, LO	Milwaukee
MP	Northern Marianas		See leaflet for Class A Rates			Reno
OH	432	I	38¢	48.00	5¼%†	Columbus
	All Other Zips	II	*	55.00	*	*
OK	All Zips	II	65¢	80.00	4.5%, TR, LO	Kansas City
OR	All Zips	II	65¢	80.00	0	Reno
PA	169, 180-196	II	42¢	64.00	6%, TR	Manchester
	All Other Zips	*	70¢	80.00	* *	Columbus
					(Omit tax on footwear & clothing.)	
Puerto Rico			See leaflet in this catalog for rates.			Atlanta
RI	All Zips	II	42¢	64.00	7%	Manchester
					(Omit tax on footwear & clothing.)	
SC	All Zips	II	48¢	60.00	5%	Atlanta
SD	All Zips	II	65¢	90.00	4%, TR, LO	Kansas City
TN	All Zips	II	48¢	60.00	5½%, LO	Atlanta
TX	All Zips	II	65¢	80.00	6.25%, TR, LO	Kansas City
UT	All Zips	II	65¢	80.00	5%, TR, LO	Reno
VT	All Zips	II	42¢	64.00	4%	Manchester
Virgin Islands	All Zips		See leaflet in this Catalog for rates.			Atlanta
VA	220-225, 227-246	II	53¢	60.00	4½%, TR	Atlanta
	226	*	44¢	*	*	Columbus
WA	987 (APO/FPO)	II	APO/FPO-Class A Merch. Only			Reno
	All Other Zips	*	65¢	80.00	6½%, TR, LO	*
WV	All Zips	II	42¢	60.00	6%, TR	Columbus
WI	532	I	42¢	51.00	5%, TR, LO	Milwaukee
	All Other Zips	II	*	*	* * *	*
WY	820, 822-828	II	*	*	3%, TR, LO	Kansas City
	821, 829-831	*	*	*	* * *	Reno

*NOTE: See "Shopping by Mail" on page 740 for the Distribution Center to which your orders should be sent. It may be different from your Customer Service/Return Distribution Center. See page 746 for the full address of your Customer Service/Return Distribution Center.

These rates are subject to change at anytime.

†Rate includes local tax for Distribution Center Location.

TR Sales tax applies to transportation-and-handling charge on Home Delivery orders in these states—see Sales Tax section, page 741.

LO Local taxes (county, city, etc.) in these states must be included in payment—see Sales Tax section, page 741.

No. 91-194

Supreme Court, U.S.
FILED
DEC 26 1991
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

QUILL CORPORATION,
Petitioner,
v.
STATE OF NORTH DAKOTA,
by and through its Tax Commissioner,
HEIDI HEITKAMP,
Respondent.

On Writ of Certiorari to the Supreme Court of North Dakota

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-194

QUILL CORPORATION,

Petitioner,

v.

STATE OF NORTH DAKOTA,
by and through its Tax Commissioner,
HEIDI HEITKAMP,

Respondent.

On Writ of Certiorari to the Supreme Court of North Dakota

BRIEF AMICUS CURIAE FOR THE STATE OF NEW JERSEY SUPPORTING RESPONDENT

INTEREST OF AMICUS

The State of New Jersey, like respondent the State of North Dakota, imposes a sales and use tax on retail sales and tangible property, payable by New Jersey customers and collectible by vendors. Under the New Jersey statute, the term "vendor" is defined as: "A person who solicits business either by employees, independent contractors, agents or other representatives or by distribution of catalogs or other advertising matter and by reason thereof makes sales to persons within the State of tangible personal property or services, the use of which is taxed by this act." N.J.S.A. 54:32B-2(i)(c). Despite this provision, numerous vendors, relying on the decision in *Na-*

tional Bellas Hess, Inc. v. Department of Revenue, 386 U.S. 753 (1967), promote and sell their goods in New Jersey—through the use of direct mail catalogs, telephones, television, and computers—but refuse to collect the requisite taxes. The New Jersey Division of Taxation estimates that in 1990 such direct-marketing sales to New Jersey residents and businesses amounted to approximately $4.34 billion. As a result, New Jersey lost approximately $141 million in tax revenue for that year.

These direct marketers, while refusing to collect the applicable state taxes, nevertheless derive substantial benefits from the organized markets that the State makes available to them. In addition, the flood of direct mail solicitations and glossy catalogs that such vendors pour into the State imposes enormous governmental costs, both directly in terms of waste disposal programs and derivatively in terms of environmental burdens. For these reasons, the State of New Jersey has a direct and immediate interest in the outcome of this litigation. In particular, New Jersey requests that *National Bellas Hess* be overruled so that companies like petitioner can be made to collect and remit their fair share of the taxes necessary to support the benefits that they derive from, and the costs that they impose on, the State.

SUMMARY OF ARGUMENT

This Court's decision in *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), should be overruled. To begin with, it rests on two legal propositions that are inconsistent with constitutional doctrine as it has been clarified since 1967. First, *National Bellas Hess* relies on the formalistic notion that so-called "exclusively" interstate commerce is immune from state taxation, but that notion was explicitly repudiated by this Court in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). Second, *National Bellas Hess* also relies on the notion that some physical presence in a State is an essential precondition to the State's exercise of jurisdiction over a person, but that notion—which even in 1967 was contrary to due process case law (not cited by the Court in its opinion in *National Bellas Hess*), *see McGee v. International Life Ins. Co.*, 355 U.S. 220, 222, 223-24 (1957); *International Shoe Co. v. Washington*, 326 U.S. 310, 321 (1945)—has likewise now explicitly been laid to rest. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985). Both doctrinal developments turn away from the rigid formal lines reflected in *National Bellas Hess* toward a more practical focus on current economic realities. *See Complete Auto*, 430 U.S. at 279; *Burger King*, 471 U.S. at 476.

Such a practical focus makes clear that not only the doctrinal underpinnings but also the critical factual assumptions of the majority opinion in *National Bellas Hess* are today insupportable, both factually and as legal grounds for denying state taxing authority over out-of-state direct marketers. First, the idea that States do not accord such marketers protections and services that benefit their businesses (386 U.S. at 757, 760) simply does not fit the facts: state governments provide or protect the essential infrastructure that makes possible the successful, continuing completion of marketers' transactions—*e.g.*, the education and economies that create able consumers; the roads, telephone networks, cable television networks, and other means of communication through which the goods are advertised, sales solicited, orders placed, credit checked, bills sent and paid, and goods delivered; insurance, police, and fire services that protect homes and buildings where goods are used or stored; the banking systems that make possible the ubiquitous use of credit cards; the waste services that enable consumers to dispose of the millions of catalogs marketers send out each year; and the legal institutions that structure and enforce the terms of the commercial transactions. Second, the idea in *National Bellas Hess* that the administrative burdens on marketers justify tax immunity (386 U.S. at 760) is likewise fundamentally wrong. For one thing, the costs of compliance, like the rate of the tax, are

not properly relevant to the constitutional analysis of taxing authority at all under the approach of *Complete Auto*. And, in any event, with the advent of powerful, inexpensive computers, the costs of compliance with state tax laws are now relatively insubstantial.

The problem with *National Bellas Hess* is not simply that its foundations have been rendered clearly anomalous by legal and factual developments since 1967. The decision affirmatively undermines important constitutional values protecting both States and businesses. First, because of the tremendous growth of direct marketing in the past two decades, *National Bellas Hess* removes from the States' tax base an ever-growing share of the nation's commercial activity, depriving States of approximately $2 billion annually. The effect of thus immunizing a $180 billion-a-year industry from *any* State's sales and use tax —placing the industry in a kind of no-state's land within the national economy—is directly to threaten States' constitutionally rooted authority to ensure that *all* businesses that benefit from state services pay their way. Second, in-state businesses are likewise harmed by the tax immunity conferred by *National Bellas Hess*: they not only suffer a direct disadvantage in competing for customers (who can buy goods tax free from the out-of-state firms) but must also pay higher in-state taxes to make up for the diminishing revenue base available to the States. This sort of discrimination between in-state and out-of-state commerce, effectively compelled by *National Bellas Hess*, turns the commerce clause antidiscrimination principle on its head.

Petitioner and its amici have not advanced any good reason for preserving the erroneous, unfair, and outmoded rule laid down in *National Bellas Hess*. In particular, there is no substantial claim to reliance on this discriminatory, often-questioned decision, which was rendered in an area of law where evolution and overruling have long been common. Moreover, concerns about determining

which direct marketers must comply with tax obligations are both insignificant and, in any event, plainly insufficient to justify retention of the rigid rule immunizing even large companies like Quill from state tax obligations. Finally, the issue of whether any overruling of *National Bellas Hess* should be retroactive is separate from the question presented here and should be left for another day.

ARGUMENT

NATIONAL BELLAS HESS SHOULD BE OVERRULED

Overruling a constitutional precedent, while less extraordinary than overruling a statutory precedent, nevertheless requires "special justification." *Arizona v. Rumsey*, 467 U.S. 203, 213 (1984). Such justification is present when a decision of this Court not only was weakly reasoned originally but has become clearly out of step both with basic constitutional doctrine as clarified since the decision and with the present realities governed by the decision. *See Payne v. Tennessee*, 111 S. Ct. 2597, 2609-10 & n.1 (1991). In particular, in the area of state regulation or taxation of interstate business activities, this Court has frequently overruled precedents under the due process and commerce clauses to bring case law into line with coherent doctrine and current factual context. *See ibid.*; Appendix G to Brief of Amici Curiae Arizona Mail Order Company, *et al.*

Under this analysis, *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), should be overruled. It is beyond serious dispute that the imposition of use-tax collection duties on an out-of-state direct-marketing business that regularly solicits and does business within a State, like petitioner Quill, is constitutional under a straightforward application of the prevailing four-part test of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). Thus, as explained more fully below, such a State clearly has a substantial nexus with

sales to its residents made by a seller who has directed its sales efforts into the State and relied on state protections that make the solicitations and sales possible. The use tax is fairly related to in-state activities, since in-State users pay it; and the requirement that out-of-state sellers collect it is likewise fairly related to the state's protection of the conditions that make the commercial transaction possible, including means of communication, distribution, and disposal. There can be no problem of fair apportionment, if only because no other State can tax the use of the products within the State. *See National Geographic Soc'y v. California Bd. of Equalization*, 430 U.S. 551, 558 (1977).[1] And there is no discrimination in requiring out-of-state sellers, like their in-state competitors, to collect the use tax (or pay the coordinated sales tax).

Notwithstanding the clear validity of the tax at issue in this case under current doctrine, *National Bellas Hess* would declare the tax invalid. The reason, quite simply, is that the decision relies on doctrinal principles and factual assumptions that are not today supportable. The underpinnings of the decision, some of them inadequately considered even as an original matter, plainly are no longer valid. To the contrary, the decision undermines

[1] Nor is there a problem of duplicative taxation arising from sales taxes imposed by sellers' States. In light of constitutional problems with such a tax (*see Evco v. Jones*, 409 U.S. 91 (1972)), States have not in fact tried to impose sales taxes on their own direct marketers' sales to out-of-state customers. *See* Rothfeld, *Mail-Order Sales and State Jurisdiction to Tax*, Tax Notes at 15 n.140 (Dec. 23, 1991). In any event, any duplicative taxation problem would be fully cured by a requirement that payers of use taxes receive a credit for sales taxes paid out of State—a credit that virtually all States do provide and may even be constitutionally required. *See Williams v. Vermont*, 472 U.S. 14, 23 n.7 (1985); Rothfeld, *supra*, at 15 n.140.

central principles of commerce clause law. And there are no sufficient reasons to preserve the ruling.[2]

A. The Central Doctrinal Underpinnings of *National Bellas Hess* Have Been Clearly Repudiated by This Court.

Citing both the due process and commerce clauses, *National Bellas Hess* based its decision on the asserted validity of the "sharp distinction" between those sellers who have some physical presence in the taxing State ("retail outlets, solicitors, or property within a State") and those who do not. 386 U.S. at 758. The Court then explained that, without such presence, "it is difficult to conceive of commercial transactions more exclusively interstate in character than the mail order transactions" involved in that case. *Id.* at 759. Such transactions, the Court ruled, fall into the "domain where Congress alone has the power of regulation and control." *Id.* at 760 (footnote omitted). But both the notion that purely interstate commerce is immune from state taxation and the notion that physical presence is the essential precondition for a State to exercise authority over a person have now been clearly repudiated by this Court.

1. *The Formalist Doctrine Immunizing Purely Interstate Commerce from State Taxation Has Been Abandoned.*

The turning point of the Court's analysis in *National Bellas Hess* was its view of the mail-order transactions at issue as "exclusively interstate in character." 386 U.S. at 759. At the time that *National Bellas Hess* was decided, that characterization was important under prevail-

[2] The *stare decisis* analysis here is not altered by the fact that Congress can overturn commerce clause rulings of this Court. For one thing, *National Bellas Hess* relies on both the due process and commerce clauses (386 U.S. at 756); and it is, at a minimum, hardly clear that Congress can overturn due process rulings. In any event, this Court has in fact shown no hesitation in revising its commerce clause doctrine over the years—perhaps because Congress has been singularly inactive in resolving interstate taxing issues.

ing commerce clause doctrine. *Freeman v. Hewit*, 329 U.S. 249 (1946), and later cases such as *Spector Motor Serv., Inc. v. O'Connor*, 340 U.S. 602 (1951), had clearly established the principle, reflected in earlier decisions as well, that States could not tax "the very process of interstate commerce," so that a state tax on a purely interstate transaction, rather than on some local incident or activity, was invalid because it interfered with the freedom of interstate commerce. *Freeman*, 329 U.S. at 253. *See Trinova Corp. v. Michigan Dep't of Treasury*, 111 S. Ct. 818, 828 (1991).

This Court has, however, directly repudiated that principle since *National Bellas Hess*. In the landmark case of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), the Court overruled *Spector Motor* (430 U.S. at 289) and rejected "the philosophy underlying [the *Freeman*] rule" (430 U.S. at 288). Insisting on an approach to commerce clause questions based on "economic realities" (*Complete Auto*, 430 U.S. at 279), and on "the practical effect of a challenged tax" (*Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 443 (1980)), the Court thus explicitly abandoned what it has since aptly described as *Freeman*'s "formalistic approach" that kept certain transactions simply out of the reach of state taxing authorities. *Trinova*, 111 S. Ct. at 828. The critical doctrinal underpinning of *National Bellas Hess*, in short, is no longer good law.

2. *The Reliance on Physical Presence as the Essential Precondition to State Jurisdiction Has Been Clearly Repudiated.*

Beyond the Court's reliance on the *Freeman* principle as the *reason* for adhering to the "sharp distinction" between sellers with and sellers without physical presence in a State (386 U.S. at 758), the *National Bellas Hess* Court's very insistence on the necessity of physical presence is itself not sound. Even at the time of *National Bellas Hess*, the majority's analysis of the need for physical presence to justify exercise of taxing authority was deficient, because it ignored existing precedent on the point. Thus, the Court recognized the essential similarity of the due process and commerce clause requirements of a sufficient connection between the taxing State, its measure of taxation, and the subject of taxation. 386 U.S. at 756.[3] But the majority then wholly failed to consider the pertinent due process precedents on physical presence: *McGee v. International Life Ins. Co.*, 355 U.S. 220, 222, 223-24 (1957), had upheld a State's authority to exercise personal jurisdiction over an out-of-state firm without physical presence in the State (based on purposeful solicitation of business through mailings into the State); and *International Shoe Co. v. Washington*, 326 U.S. 310, 321 (1945), had held that the minimum contacts that were sufficient to exercise personal jurisdiction over an out-of-state company "subject[ed] it alike to taxation by the state." Together, those precedents directly undermined the *National Bellas Hess* Court's reliance on physical presence as the key to state taxing authority. Yet the Court never discussed those decisions.

In any event, since *National Bellas Hess* was decided, the Court has made crystal clear that, under the due process clause, physical presence is *not* a precondition to a State's exercise of jurisdiction over an out-of-state company. In *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985), the Court expressly stated that physical presence is not required for personal jurisdiction, explaining that "it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across

[3] Since *National Bellas Hess*, of course, those requirements have been stated as the nexus and fair relation components of the four-part commerce clause standard of *Complete Auto*. The Court has continued to recognize, as it did in *National Bellas Hess*, that these tests also encompass due process requirements. *See, e.g., Trinova*, 111 S. Ct. at 828; *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. at 436-37.

state lines, thus obviating the need for physical presence within a State in which business is conducted." Thus focusing on the realities of modern commerce—as the Court has done since adopting the practical, *Complete Auto* approach to commerce clause analysis—the Court in *Burger King* held that a State had jurisdiction over any business that "'purposefully directed'" its commercial efforts toward residents of the State. *Ibid.* (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774-75 (1984)). There is, quite simply, no good reason why taxing jurisdiction should have to meet any higher standard than adjudicative jurisdiction, or why commerce clause standards in this regard should be any more stringent than due process standards.[4] Accordingly, the "physical presence" litmus test on which *National Bellas Hess* critically relied is not now, if it ever was, good law.

B. The Critical Factual Assumptions in *National Bellas Hess* Are Insupportable Today, Both Factually and as Grounds for Immunizing from State Tax Obligations Direct Marketers that Regularly Market in a State.

In setting forth its notions about the need for physical presence and the exclusively interstate character of the commerce at issue, the Court in *National Bellas Hess*

[4] As to the constitutional equivalence of taxing and adjudicative jurisdiction, not only does *International Shoe* remain good law, but the equivalence follows from the fact that a State's exercise of personal jurisdiction often does mean, and constitutionally can generally mean, that an out-of-state seller is subject to the State's substantive law in the State's courts. *See, e.g., Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981); *Restatement (Second) of Conflict of Laws* §§ 6, 9, 145-146 (1971); *cf. Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). This is particularly significant for direct marketers, who are forbidden by the Federal Trade Commission to bring suit against purchasers except in the courts of the purchaser's home State. *See Spiegel, Inc. v. FTC*, 540 F.2d 287 (7th Cir. 1976). *See generally* Rothfeld, *supra*, at 5-6 nn.73, 82. If a State may apply its own law in its own courts to out-of-state direct marketers, it surely can impose on those firms the duty of collecting use taxes for goods sold to in-state purchasers.

made two critical assumptions, or assertions, of a factual nature. First, as to the State's interest, the Court indicated that a State has "no legitimate claim to impose 'a fair share of the cost of the local government'" on a seller with no physical presence in the State (386 U.S. at 760), stating earlier in the opinion that such a seller is not "accorded the protection and services of the taxing State" (*id.* at 757). Second, as to the seller's interest, the Court stressed the burden a seller would incur—and that interstate commerce would therefore incur—if the seller had to obtain and maintain accurate information about the taxes it had to collect in each of the numerous jurisdictions where it made a sale. *Id.* at 760.

As already noted, the Court has, in its due process doctrine, repudiated the notion that a State provides no protections to businesses unless they are physically present in the State. And the *National Bellas Hess* concern with administrative burdens seems hard to wrench from the context of the majority's now-rejected focus on "exclusively interstate" commerce. But in any event, both views of the *National Bellas Hess* majority—about the absence of state protections for and the significance of burdens on out-of-state sellers—are insupportable, at least under present legal and factual circumstances.

1. *States Provide Important Protections Necessary to the Continuing, Successful Completion of Direct Marketers' Commercial Transactions.*

The majority opinion in *National Bellas Hess* essentially ignored the dissent's description of the significant protections States provide to out-of-state mail-order businesses: most notably, the States protect the soundness of the banking institutions that provide the consumer credit without which many of the transactions would be impossible; and they provide the courts that ensure collection of the purchase price from the seller's customers. 386 U.S. at 762 (Fortas, J., dissenting). Those and other protections—of the consumers who purchase, of the roads

and other means for delivering the solicitations and the goods, of the means of disposing of the inevitable waste byproducts of the seller's efforts in the State—were inadequately considered by the majority in *National Bellas Hess* and should have been sufficient to sustain the imposition of tax obligations even in 1967, even on an out-of-state seller that handled its solicitations, order-taking, and delivery entirely through the mails (or other common carrier of physical goods). But whatever the case may have been in 1967, it is clear that, today, the protections given to out-of-state direct marketers are manifold and manifestly substantial, and that States are entitled to "ask return" for those protections by demanding collection of the use tax. *See Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940).[5]

Today, direct marketers like Quill conduct their business differently from the "mail order" business at issue in *National Bellas Hess*. Rather than relying predominantly on the mails for solicitation, direct marketers massively use the telephone and other means, such as cable television, to solicit sales. Consumers, for their part, rather than placing orders by mail, as in *National Bellas Hess* (386 U.S. at 754), now tend to place their orders by telephone (or, increasingly, by computers hooked up to telephone lines), using "800" or similar numbers that the direct marketers publish and advertise in the State. (The seller in *National Bellas Hess* had no telephone listing in the State. 386 U.S. at 754.) And rather than paying either by check or by credit arrangement directly with the seller, as in *National Bellas Hess* (386 U.S. at

[5] The seller in *National Bellas Hess* was truly a "mail order" business, in that the mails were used not only to send solicitations but to take orders for merchandise. The term "mail order" is no longer accurate for the many companies that handle their business, or a large share of it, by telephone, television, or other electronic means. Hence the more general term "direct marketer," describing companies that market goods directly to consumers, without using a retail outlet.

761 (Fortas, J., dissenting)), consumers now pay predominantly with credit cards, which are, of course, infinitely more common than they were in 1967.[6]

Given these and the other circumstances surrounding modern direct-marketing transactions, it is easy to identify the numerous protections and benefits offered by States to make the commercial transactions possible—that is, to make direct marketers' business possible. At the most basic level, States provide a host of services and protections for the economy itself—that is, for consumers' very ability to buy goods. Through schools and jobs, for example, States help create consumers with the resources to purchase. And consumers' homes and offices, where goods will be used, are protected by government fire, police, and other services. State regulation of insurance, moreover, helps protect the value of goods that consumers buy, thereby making purchase more likely.

States protect numerous aspects of the direct marketers' side of the commercial transaction as well, including solicitation, order-taking, finance, delivery, and post-purchase dispute resolution. Thus, solicitation activities that use the mails depend on roads maintained by state government, traffic regulation provided by the State, and sorting facilities protected by state police, fire, and insurance services. Solicitation activities that use electronic communication depend, for example, on the telephone network regulated by state utility commissions (and their requirements of universal service), on the telephone directories provided under state regulation, or on cable television networks regulated through local government

[6] *See, e.g.*, Stipulation in *Lands' End, Inc. v. California State Bd. of Equalization*, No. 620135 (Super. Ct., San Diego County) (86% of Lands' End sales by credit card, and 80% of orders placed by telephone).

One consequence of credit-card payment is that, even for consumers that place their orders by mail, the marketer can, upon receiving the order, calculate and add in the proper use tax to the credit card bill.

franchises. And the solicitations, when in the form of catalogs, create a major problem of waste that state governments do and must address, through garbage collection, recycling, and disposal in land fills.[7]

Beyond the solicitation, a customer's ordering of a marketer's goods depends either on the mails or on the electronic communication networks protected by the State. The seller's acceptance of the order often involves an instant credit check by the seller, conducted through the same telephone network. Payment by the customer often is made by credit card, which relies not only on the telephone network and mails for credit-checking and billing, but also on the banking system, whose soundness is a principal responsibility of state governments. Delivery of goods, once ordered and paid for, then itself depends on the roads provided by state government and on the warehouses and other facilities protected by state police, fire, insurance, and other programs. And if the commercial transaction gives rise to disputes, litigation and collection activities inevitably depend on the state courts for adjudication, sheriffs for execution, and commercial and other laws for substantive standards.[8]

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[7] In fiscal year 1989, for example, Lands' End of Chicago mailed 75,000,000 catalogs averaging 156 pages each. *See Lands' End, Inc., supra.*

Paper now makes up the largest single component (40 percent) of solid waste in the country. *See* U.S. Congress, Office of Technology Assessment, *Facing America's Trash—What Next for Municipal Solid Waste*, at 73-84, OTA-0-424 (October 1989).

[8] Not only can state courts exercise personal jurisdiction over out-of-state firms that direct their business into the State (*Burger King, supra*), but an out-of-state direct marketer must, by FTC requirement, bring any suit against a customer in the customer's home-state courts (*Spiegel, Inc., supra*). A local bank providing a customer's credit card, and hence guaranteeing payment to the seller, will also use the state courts for collection efforts. And it is well-established that state consumer-protection and usury laws apply to direct-marketing transactions. *See, e.g., State ex rel. Meierhenry v. Spiegel, Inc.*, 277 N.W.2d 298 (S.D.), *appeal dismissed*, 444 U.S. 804 (1979) (consumer protection laws); *Aldens, Inc. v. Miller*, 610 F.2d 538 (8th Cir. 1979), *cert. denied*, 446 U.S. 919 (1980) (usury laws); *Aldens, Inc. v. Ryan*, 571 F.2d 1159 (10th Cir.), *cert. denied*, 439 U.S. 860 (1978) (same); *Aldens, Inc. v. LaFollette*, 552 F.2d 745 (7th Cir.), *cert. denied*, 434 U.S. 880 (1977) (same); *Aldens, Inc. v. Packel*, 524 F.2d 38 (3d Cir. 1975), *cert. denied*, 425 U.S. 943 (1976) (same). The protection of consumers by these laws, of course, gives consumers the purchasing confidence needed for direct marketers to survive.

In short, it cannot seriously be contended that direct marketers who lack a physical presence in a State receive no significant protections and benefits from the States into which they protect their commercial activities. Direct marketers that sell throughout the country do not operate in a zone somehow independent of the numerous market-protecting services provided by the 50 States. To the contrary, the States provide the very infrastructure that makes the transactions of direct marketers possible.

2. *The Burdens on Direct-Market Sellers Today Cannot Justify the Rule of* National Bellas Hess.

As an initial matter, burdens on out-of-state sellers are simply not relevant to the constitutional analysis: such burdens cannot invalidate an otherwise-justified tax on (or collection duty imposed on) out-of-state direct marketers, much less support a rigid rule against such impositions unless the business is physically present in the state. Burdens on taxpayers, let alone on sellers who merely collect taxes owed by others, are simply not relevant to the "nexus" or "fair relation" tests: the former looks only to the existence of a connection between the State and the seller's activities (sale to a resident); and the latter looks only to the relation between the measure of the tax (sales price) and the in-state activities (sale in the State). *See, e.g., Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 622-26 (1981); *Exxon Corp. v. Wisconsin Dep't of Revenue*, 447 U.S. 207, 219 (1980). Neither test calls for a balancing of burdens on the seller against protections pro-

vided by the State, whether those burdens are administrative in nature or directly monetary (such as the burden of a high tax rate). The majority in *National Bellas Hess* never explained why administrative burdens should be material to the constitutional inquiry—rather than, like the rate of the tax, simply a matter for legislative consideration. *Cf. Commonwealth Edison Co. v. Montana*, 453 U.S. at 628 (refusing to review "acceptable rate or level of taxation"). And those burdens are in fact constitutionally irrelevant. In addition to the obvious judicial unmanageability of an inquiry into "excessive" taxpayer burdens, the Court has made clear that the Constitution cannot relieve businesses of "their just share of [the] state tax burden even though it increases the cost of doing business." *Complete Auto*, 430 U.S. at 279; *see Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938).[9]

Nor did, or could, the majority in *National Bellas Hess* explain why, even if administrative burdens were constitutionally relevant, those burdens justified a constitutional line that turns on the direct marketer's physical presence in the State. Thus, companies like Sears and Montgomery Ward may have direct-marketing divisions wholly separate from their retail outlets, and the burdens on those divisions may be identical to those incurred by direct-marketing companies with no in-state presence; yet, even before *National Bellas Hess*, it was clear that a State could freely impose those burdens on the direct-marketing parts of the businesses. *See Nelson v. Montgomery Ward & Co.*, 312 U.S. 373 (1941); *Nelson v.*

[9] Even if constitutionally relevant, the practical burdens faced by taxpayers could not justify the rigid *National Bellas Hess* rule. At most, such burdens could call for constitutional scrutiny of certain cases where state taxes imposed burdens on sellers wholly out of proportion to their in-state activities. Although even that seems intrinsically unlikely, certainly this consideration cannot justify a prohibition on a State's taxing of large companies, like Quill, that regularly solicit and conduct substantial volumes of business in the State. *See* note 11, *infra*.

Sears, Roebuck & Co., 312 U.S. 359 (1941); *see also D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 33 (1988).[10] And more recently, a dozen years after *National Bellas Hess* was decided, the point became even more starkly clear. The Court held in *National Geographic Soc'y*, *supra*, that a minimal presence unrelated to any retail sales at all (several solicitors of advertising) was sufficient to sustain a State's requirement that an out-of-State seller (of magazines) collect use taxes—even though the administrative burden on the out-of-state part of the business was identical to what it would have been if the company had no in-state presence at all. Again, it makes no sense in light of relevant doctrine, especially as clarified since *National Bellas Hess*, to adopt a constitutional standard turning on physical presence based on concerns about administrative burdens on sellers who are exploiting the protections the State provides to their commercial transactions.

In any event, the administrative burdens on out-of-state direct marketers, however significant they were at the time of *National Bellas Hess*, are relatively insubstantial today. The burden that concerned the Court in *National Bellas Hess* was the burden of obtaining and maintaining accurate information about the taxes due in each of the jurisdictions where the seller's customers reside. But this informational burden is no longer terribly great—for precisely the same reason that has allowed direct marketing to flourish (*see* page 20, *infra*).

[10] The burden that the Court thought decisive in *National Bellas Hess* was the burden of collecting and maintaining information about the taxes in the numerous taxing jurisdictions where customers live and would use the goods sold. 386 U.S. at 759-60. It is hard to see why the constitutional inquiry should turn on whether a retail store's employees sent the information along to the separate mail-order division or, instead, the mail-order division had to write to the taxing authorities to obtain the tax information. Of course, if there were a large number of local jurisdictions with different tax requirements (a premise of *National Bellas Hess*), a company that had only a few retail outlets in a State would not likely have tax information about all those jurisdictions in any case.

Quite obviously, since 1967 there has been a revolution in information collection, processing, storage, and retrieval. Computers have become ubiquitous and cheap. It is computer technology that has allowed direct marketers to target their potential customers, to conduct mass mailings, and to handle high volumes of business. *See* M. Sroge, *Inside the Leading Mail Order Houses* at viii (3d ed. 1989). The same computer technology likewise makes possible essentially instant access to up-to-date taxing information.

Even putting aside nationwide tax manuals, the information at issue here—taxing data from some 6500 jurisdictions—is readily available in up-dated format through computer software that runs on main-frame, mini-, or IBM-type personal computers. This last type of equipment costs only several thousand dollars and is likely to be already owned and used by the direct marketer for word processing, billing, recordkeeping, and other purposes. And the software—which also prepares tax returns—costs roughly $12,000 to purchase and $10,000 per year for service and monthly updates. *See* Brief Amicus Curiae for Connecticut *et al.*, Appendix D; Brief for Respondent (fuller discussion of computer technology).

Identifying the necessary tax information is thus a task different only in degree, but not in kind, from the seller's job of identifying the shipping and handling charges for the deliveries it makes to different locations. And the task is made much simpler than the direct marketers in this case have alleged by various simplifications contained in state tax statutes. Many states have no local sales or use taxes at all; and some that do have such local taxes nevertheless provide for, or give an option of, a uniform statewide rate for out-of-state sellers. *See, e.g.*, Cal. Rev. & Tax Code § 6203(j) (West Supp. 1991); Tenn. Code Ann. § 67-6-702(f) (1989); Wash. Admin. Code, Rule 458-20-221(5) (1990). In either case a seller must keep track only of the State's own tax law, including rates and exemptions. Keeping track of exemptions, moreover, will often be eased by the fact that such exemptions are often product-specific, so that a particular marketer may know that *all* of its goods (*e.g.*, clothing) are exempt. Finally, with respect to the burden of filing tax returns, statewide administration is now the norm: at least 40 States provide for the filing of a single tax return covering all jurisdictions within the State. *See* Brief Amicus Curiae of Direct Marketing Ass'n., Appendix 3.

In short, the costs of complying with state tax laws, if relevant at all, are not a significant impediment to the conduct of direct marketers' businesses, especially for large companies like Quill.[11] Certainly those costs are no different from the costs incurred by in-state retailers; and almost by definition, the costs are commensurate with the amount of business conducted in the State. Most fundamentally, however, these costs are nothing but the inherent price of doing business in numerous jurisdictions. When an out-of-state firm chooses to enter the market in a State, exploiting the government services that sustain the market, it may legitimately be subjected to that State's regulatory and tax laws, particularly those designed to ensure fair competition and adequate support for the government activities that make the firm's commercial transactions possible.

C. *National Bellas Hess* Directly Frustrates Vital Principles at the Heart of Commerce Clause Doctrine.

Not only is the *National Bellas Hess* rule's restriction on state taxing authority outmoded both factually and doctrinally, but it works affirmative harm to two values that are central to this Court's commerce clause jurisprudence—harm that now looms much larger than it did in

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[11] According to Sroge, *supra*, at 445-46, Quill had sales in 1985 of $150,000,000. *See also Lands' End, Inc., supra* (in 1989, Lands' End had sales of more than $500,000,000).

1967. First, the rule of *National Bellas Hess* has become a very substantial impediment to the States' ability to ensure that *all* businesses pay their fair share for the protections provided them by the State, because the rule exempts an ever-increasing portion of the Nation's sellers from *any* State's sales or use tax. Second, the rule turns the constitutional bar against discrimination on its head: it gives constitutional protection to out-of-state direct marketers against the very taxes that their in-state reail competitors may be made to pay, leaving the retailers, in fact, with an ever larger share of the state tax burden. These results are antithetical to the commerce clause notions of fairly apportioned and non-discriminatory tax burdens on commerce.

1. National Bellas Hess *Has Removed an Ever-Increasing Share of Commerce from States' Tax Base and thus Undermines States' Ability to Make All Commerce Pay Its Fair Share of Government Services.*

The magnitude of the *National Bellas Hess* rule's impact on the States has dramatically increased since 1967. In 1967, total mail-order sales were estimated at $2.4 billion. *National Bellas Hess*, 386 U.S. at 763 (Fortas, J., dissenting). By 1989, direct-marketing sales were estimated at $183.3 billion. Pet App. A12; *see also* Hartman, *Collection of the Use Tax on Out-of-State Mail-Order Sales*, 39 Vand. L. Rev. 993, 1006 (1986) (50 to 150 billion dollars in 1985). These figures reflect the fact that direct-marketing sales have grown faster than local retail sales, thus taking over an ever larger share of total sales. *See* Sroge, *supra*, at ix; H. Bruce, *Industry Outlook: What Happens Next?*, DM News (June 18, 1990), at 13 (between 1980 and 1989, direct-marketing sales grew at 15% a year, while retail sales grew at 5% a year). Today, direct marketing sales account for between 15 and 25 percent of all retail sales in this country. Hartman, *supra*, at 1007-08.

The consequence of these developments, under the rule of *National Bellas Hess*, is that States are being stripped of an ever larger part of their tax base. More and more of the sales business of the United States—not subject to use taxes in the customers' States and not subject to sales taxes in the sellers' States—is becoming immune from taxation, as though it were part of the national economy without being part of any State's economy. The loss in revenues to financially strapped States was estimated at $1 billion in 1985 and $2 billion in 1988. *See* Hartman, *supra*, at 1007-08; Advisory Comm'n on Intergovernmental Relations (ACIR), *Estimates of Revenue Potential from State Taxation of Out-of-State Mail Order Sales* at 8 (Staff Information Report SR-5, Sept. 4, 1987). Yet sales and use taxes have become an increasingly important revenue source since 1967, rising from 19% of total state tax revenues in 1967 to 24% in 1982, with most States having raised their rates. *See* ACIR, *State and Local Taxation of Out-of-State Mail Order Sales* at 6 (Commission Report A-105, Apr. 1986); Rothfeld, *supra*, at 5-6 & n.16.[12]

In addition to being a matter of great practical concern to the States, this removal of an increasingly substantial part of commerce from States' revenue base is of constitutional concern. Central to its modern commerce clause jurisprudence, the Court "consistently has indicated that 'interstate commerce may be made to pay its way.'" *Complete Auto*, 430 U.S. at 281. That principle not only acts as a limit on commerce clause restrictions imposed on the States; it is itself an affirmative, constitutionally rooted protection of the States, implicit in the constitutional structure's commitment to a federal system that protects traditional state power like the power to tax those who exploit state protections. *See Boston Stock*

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[12] According to the cited 1986 ACIR report (at 24-25), in 1983, sales tax revenues provided between 16 and 59 percent of individual state tax revenues.

Exch. v. State Tax Comm'n, 429 U.S. 318, 328-29 (1977) ("reserved 'power of the States to tax'") (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 199 (1824)). *National Bellas Hess* has become a serious practical threat to that cardinal principle.

2. National Bellas Hess *Sanctions Discrimination Between In-State Businesses and Their Out-of-State Competitors.*

At the same time that it threatens the important interests of the States, *National Bellas Hess* also works immediate harm to the in-state retail competitors of out-of-state direct marketers. That harm is of two kinds. First, in-state retailers are placed at a direct disadvantage in competing for customers against out-of-state direct marketers, because under *National Bellas Hess* the out-of-state sellers need not charge to their customers the very taxes that their in-state competitors must charge to their customers. When tax rates are roughly 5-8%, that differential provides a substantial benefit to the out-of-state company. Second, when the out-of-state marketers are removed from a State's tax base, in-state businesses must pay even higher taxes to make up for the revenue shortfall to the State. This shifting of an increased burden onto the in-state businesses further accentuates the advantage given out-of-state marketers by *National Bellas Hess*.

A rule commanding such favoritism turns the anti-discrimination principle of the commerce clause upside down. That principle is designed to "maintain state boundaries as a neutral factor in economic decisionmaking." *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266, 283 (1987); *see Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. at 329-33. Yet the rule of *National Bellas Hess* gives a distinct advantage to a business depending on whether it is located outside or inside a State, thus affirmatively encouraging a retailer to close up shop,

move out of State, and sell its goods as a direct marketer. That is the antithesis of ensuring the neutrality of state boundaries.

By contrast, the extension of use tax collection duties to out-of-state direct marketers directly serves the commerce clause goal of equal treatment of all commercial competitors, whether in-state or out-of-state. Such an extension serves not only "to compensate the state for revenue lost when residents purchase out-of-state goods for use within the State" (*D.H. Holmes Co.*, 486 U.S. at 32), and thus to force out-of-state marketers that exploit in-state customers to share some of the revenue burden carried by their in-state retail competitors; it also serves the fair-competition purpose of removing a substantial inequality in the terms on which they compete for customers. So, too, the overruling of *National Bellas Hess* would promote the constitutional goal of equal treatment of interstate and intrastate commerce.

D. Reliance Interests and Concerns About Line-Drawing and Retroactivity Do Not Justify Leaving *National Bellas Hess* in Place.

Retention of *National Bellas Hess* has been urged on the ground that out-of-state direct marketers have relied on the rule. Another reason given for retaining the rule of *National Bellas Hess* is that some direct marketers may have difficulty determining whether they meet the various States' tests of "regularly" or "systematically" soliciting business in the State. And concerns about the potential disruption caused by the potential retroactivity of an overruling of *National Bellas Hess* have also been advanced as a reason not to overrule the decision. None of those arguments can justify leaving this rigid, erroneous, unfair, and outmoded decision on the books.

1. *Reliance.* The asserted reliance interests cannot warrant retention of *National Bellas Hess*. To begin with, the claimed reliance interests are no different from those

present in the several other cases in which this Court has nevertheless overruled commerce clause precedent to eliminate artificial, outmoded doctrinal limitations on taxing authority. *See, e.g., Goldberg v. Sweet*, 488 U.S. 252, 265 n.16 (1989); *Commonwealth Edison Co. v. Montana, supra*; *Department of Revenue v. Association of Washington Stevedoring Cos.*, 435 U.S. 734 (1978); *Complete Auto, supra.* And this process of doctrinal evolution, especially in the commerce clause area, has long been a familiar and expected part of the constitutional regime under which commercial enterprises must make their business decisions. *See Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 473 (1959) (Frankfurter, J., dissenting).

The reliance interests are particularly weak in this case. The *National Bellas Hess* rule has been subject to serious question in prominent scholarly literature for many years, and it has been clear at least since *Complete Auto* that the central doctrinal underpinning of the decision is no longer good law. *See, e.g.*, Hartman, *supra*; P. Hartman, *Federal Limits on State and Local Taxation* § 10:8, at 627-28 (1981). Moreover, investments made in reliance on blatantly discriminatory favoritism are hardly worthy of special regard. Direct marketers who grew dramatically faster than their in-state retail competitors based on such advantages over the past 20 years should not now be heard to complain that they must at long last compete on more equal terms. And that, of course, is the only result of overruling *National Bellas Hess*, which would hardly stop direct marketers from engaging in their businesses. The complaints about impaired reliance interests have a peculiarly hollow ring when all that is being done is to force direct marketers to share a tax-collection burden that their competitors already incur. In any event, these complaints are insufficient to stand in the way of correcting an anomalous precedent that is profoundly unfair to both the States and in-state businesses.

2. *Line-Drawing.* Retention of *National Bellas Hess* likewise cannot be justified on the ground that there is no bright line between those direct marketers who do, and those who do not, meet state statutory or constitutional nexus standards. For one thing, the line-drawing problems, which are initially a question of notice to direct marketers and secondarily a question of judicial definition of the line, are substantially exaggerated by the direct marketers in this Court. Some States, like North Dakota in this case, provide an easy-to-apply rule: in the present case, three separate advertisement mailings in a year. Pet. App. A56. Moreover, state taxing authorities are available and likely to provide guidance to marketers, by regulation or otherwise.

Even aside from such aids to application, however, the standard itself—certainly the constitutional minimum of purposeful in-state solicitation, but also the prevalent statutory criteria, *see* Brief Amicus Curiae of National Conference of State Legislatures *et al.* on Petition for Writ of Certiorari at 7-8 & nn.6 & 7—should not present any substantial practical problems. The fact is that even a standard of regular, substantial, systematic, or recurring directed marketing into a State is sufficiently low, indeed not materially different from a simple purposeful solicitation standard, that virtually all direct marketers who deliberately direct their selling activities into a State will have to, and know that they have to, comply with their use-tax collection duties. These standards are, quite simply, every bit as manageable as the purposeful availment standard for due process analysis of personal jurisdiction. *See Burger King, supra*; *McGee, supra.*

In any event, these concerns about practical problems in marginal cases cannot conceivably justify retention of the rigid rule of *National Bellas Hess.* That rule immunizes even large companies doing substantial volumes of business in a State from the tax obligations shouldered by their in-state competitors. That result is so clearly

wrong that it should be overruled even if, at a later time, state courts or this Court might have to address whether a particular low level of activity directed into the State is insufficient under state statutes or the Constitution. Just as in *Complete Auto*, "administrative convenience, in this instance, is insufficient justification for abandoning the principle that 'interstate commerce may be made to pay its way.' " 430 U.S. at 288 n.15.

3. *Retroactivity.* Finally, concerns about the retroactivity of a decision overruling *National Bellas Hess* cannot justify retaining the decision. It is sufficient to say that the question of retroactivity is separate and distinct from the question of the continuing validity of the *National Bellas Hess* rule. The retroactivity question presents an issue for another day in another case.

CONCLUSION

National Bellas Hess should be overruled, and the judgment of the Supreme Court of North Dakota should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1991

QUILL CORPORATION, PETITIONER

v.

STATE OF NORTH DAKOTA,
by and through its Tax Commissioner,
HEIDI HEITKAMP, RESPONDENT

On Writ of Certiorari to the Supreme Court of North Dakota

BRIEF OF THE INTERNATIONAL COUNCIL OF SHOPPING CENTERS, INC., NATIONAL ASSOCIATION OF RETAIL DRUGGISTS, INC., NATIONAL ASSOCIATION OF RETAIL DEALERS OF AMERICA, INC., NATIONAL HOME FURNISHINGS ASSOCIATION, INC., JEWELERS OF AMERICA, INC., AMERICAN FLOORCOVERING ASSOCIATION, MARINE RETAILERS ASSOCIATION OF AMERICA, ARIZONA RETAILERS ASSOCIATION, COLORADO RETAIL COUNCIL, CONNECTICUT RETAIL MERCHANTS ASSOCIATION, FLORIDA RETAIL FEDERATION, IDAHO RETAILERS ASSOCIATION, MICHIGAN RETAILERS ASSOCIATION, INC.,

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WAYSIDE FURNITURE STORE, A & W OFFICE
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OFFICE SUPPLY CO., INC., OFFICE SUPPLY &
EQUIPMENT CO., PHILLIPS OFFICE SUPPLIES,
INC., SMITH OFFICE PRODUCTS, AND SMITH
OFFICE SUPPLY, INC., AS *AMICI CURIAE*
IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the Commerce or Due Process Clauses of the United States Constitution precludes a State from requiring an out-of-state seller to collect use taxes on property sold to customers in the State, when the seller regularly solicits in-state but has no physical presence in the jurisdiction.

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OFFICE SUPPLY, INC., AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICI CURIAE*

Amici are businesses and organizations whose members include retailers throughout the United States. They are:

The *International Council of Shopping Centers, Inc.*, is an Illinois not-for-profit corporation. Its 24,000 members worldwide and 22,000 members in the United States include developers, owners, retailers, lenders, and all others having a professional interest in the shopping center industry. It represents almost all of the 36,650 shopping centers in the United States, which produced $723.3 billion in retail sales in 1990.

The *National Association of Retail Druggists, Inc.*, a Delaware corporation, is a private, non-profit, voluntary organization composed of independent retail pharmacists who own approximately 40,000 outlets across the country.

The *National Association of Retail Dealers of America, Inc.*, an Illinois corporation, has approximately 3200 company members who sell and service home appliances and electronic home entertainment products.

The *National Home Furnishings Association, Inc.*, an Illinois corporation, represents some 3500 company members who operate more than 13,500 home furnishing retail establishments in all 50 States.

The *Jewelers of America, Inc.*, incorporated in New York, represents more than 12,000 specialty retail jewelry stores operating 20,000 outlets in all 50 states.

The *American Floorcovering Association*, incorporated in Washington, D.C., represents 1800 retail floorcovering specialty stores with more than 4500 outlets.

The *Marine Retailers Association*, incorporated in Texas, represents 3500 marine and recreation boating retailers.

The *Arizona Retailers Association, Colorado Retail Council, Connecticut Retail Merchants Association, Florida Retail Federation, Idaho Retailers Association, Inc.,*

Michigan Retailers Association, Nebraska Retail Federation, North Dakota Retail Association, South Dakota Retailers Association, and *Texas Retailers Association* are associations that represent the interests of more than 17,000 retailers in their respective states.

The *Volunteer Office Products Association, Inc.*, a not-for-profit Tennessee corporation, represents some 175 firms in Tennessee and Kentucky engaged in the sale of office supplies, machines, and furniture.

Fortunoff Department Stores, incorporated in New York, is a retailer of jewelry and fine china with five locations in New York and New Jersey.

Wayside Furniture Store, incorporated in Connecticut, is a retailer of furniture, carpets, draperies, and accessories.

Plunkett Furniture Co. maintains eight retail stores in Illinois that sell furniture, draperies, carpeting, and other home furnishings and accessories.

A & W Office Supply, B & B Office Supply, Inc., Creswell Office Supply Co., Inc., Office Supply & Equipment Co., Phillips Office Supplies, Inc., Smith Office Products, and *Smith Office Supply, Inc.*, are Tennessee retailers and wholesalers of office supplies, machines, and furniture.

This case presents an issue of enormous importance to *amici*: whether mail order and direct marketing firms are constitutionally immune from state use taxes. Local retailers must collect and remit sales taxes in 45 States and the District of Columbia; such taxes are not imposed on sales made by out-of-state direct marketers. As a consequence, local retailers are placed at an enormous competitive disadvantage by a rule—contended for by petitioner—that also exempts direct marketers from a duty to collect compensating use taxes. *Amici* therefore submit this brief to assist the Court in the resolution of this case.[1]

[1] The parties' letters of consent pursuant to Rule 37 of the Rules of this Court have been filed with the Clerk of the Court.

STATEMENT

1. Like 44 other States and the District of Columbia, North Dakota imposes a tax on receipts from the sale of property within its borders. N.D. Cent. Code § 57-39.2. Like those other States, North Dakota also imposes a so-called compensating use tax on the in-state use of property that was purchased outside the State's taxing jurisdiction. N.D. Cent. Code § 57-40.2. Such use taxes, which are equivalent in amount to the sales tax imposed on in-state purchases of similar property, are designed both to prevent evasion of the sales tax by persons who make purchases out-of-state and to "put local retailers subject to the sales tax on a competitive parity with out-of-state retailers exempt from the sales tax." *National Geographic Society v. California Board of Equalization*, 430 U.S. 551, 555 (1977).[2]

In theory, the use tax falls upon the consumer who uses the property. See *National Geographic*, 430 U.S. at 558; Pet. App. A3. As the Court has noted, however, "the impracticability of [the use tax's] collection from the multitude of individual purchasers is obvious." *National Geographic*, 430 U.S. at 555. As a consequence, North Dakota imposes the burden of collecting the tax on all retailers "maintaining a place of business in this state" (N.D. Cent. Code § 57-40.2-07); that term is defined to include not only businesses physically present in the State, but also

> every person who engages in regular or systematic solicitation of sales of tangible personal property in this state by the distribution of catalogs, periodicals

[2] As a matter of practice, States do not attempt to impose their sales taxes on sales made in the State by direct marketers to out-of-state customers. See McCray, *Commerce Clause Sanctions Against Taxation on Mail Order Sales: A Re-Evaluation*, 17 Urb. Law. 529, 532 (1985). It is an open question whether this practice is constitutionally compelled. See *Evco* v. *Jones*, 409 U.S. 91, 93 (1972); McCray, *supra*, 17 Urb. Law. at 554-555, 565-567. Virtually all States, including North Dakota, provide credits when sales and use taxes are imposed on the same transaction by different States. See *id.* at 532.

> advertising flyers, or other advertising, by means of print, radio or television media, or by mail, telegraphy, telephone, computer data base, cable, optic, microwave, or other communication system for the purpose of effecting retail sales of tangible personal property.

N.D. Cent. Code § 57-40.2-01(7). The term "regular or systematic solicitation" is administratively defined to mean "three or more separate transmittances of any advertisement or advertisements" during a specified 12-month period. N.D. Admin. Code § 81-04.1-01-03.1(3).

2. Petitioner Quill Corporation is a Delaware corporation with offices and warehouses in Illinois, California, and Georgia. Pet. App. A2. It operates a national direct marketing business selling office supplies and equipment. *Ibid.* Petitioner does not maintain an office in North Dakota, does not send sales or other personnel into the State, and does not advertise through local newspapers or broadcast outlets. *Id.* at A39. Quill does, however, extensively solicit business in North Dakota through the use of catalogs and flyers; each year, it mails more than 60 such publications--involving more than 230,000 separate pieces of mail that, in the aggregate, weigh over 24 tons—to customers in the State. *Id.* at A3. Similarly, Quill licenses a computer software program to its North Dakota customers that permits them direct access to Quill's computer, where they may check inventory, confirm prices, and order merchandise. *Id.* at A29. In addition, Quill solicits customers by telephone and maintains a "help line" for customers to call with questions about its products. *Ibid.* As a consequence of this activity, Quill has several thousand customers and annual sales of just under $1 million in North Dakota, making it the sixth largest seller of office supplies in the State. *Id.* at A2-A3.

Although it is undisputed that petitioner meets the statutory definition of a "retailer maintaining a place of business" in the State (see Pet. App. A5), Quill refused to collect the tax on goods purchased for use in North

Dakota. See *id.* at A4. It based its position on this Court's decision in *National Bellas Hess, Inc.* v. *Department of Revenue*, 386 U.S. 753 (1967), which held unconstitutional under the Due Process and Commerce Clauses of the United States Constitution the imposition of use tax liability on a mail order firm that did not have a physical presence in the taxing State. North Dakota responded by bringing this declaratory judgment action to settle Quill's liability. See Pet. App. A4. The trial court found the State's arguments in favor of the constitutionality of its use tax "quite persuasive" (*id.* at A40), but felt constrained by the decision in *Bellas Hess* to hold the tax unconstitutional as applied to Quill. *Id.* at A42.

The North Dakota Supreme Court reversed. Pet. App. A1-A36. The court began by observing that "[t]he economic, social, and commercial landscape upon which *Bellas Hess* was premised no longer exists," noting that " 'mail order' has grown from a relatively inconsequential market niche into a goliath now more accurately delineated as 'direct marketing.' " *Id.* at A11. The court explained that the volume of mail order sales has grown exponentially (*id.* at A12) and that, as a consequence of changing technology, "[t]oday a direct marketer can communicate with his customers across the country through toll-free incoming telephone lines, national WATS telephone service, fax machines, telex, or direct computer communication just as effectively, and more efficiently, than if he were calling personally on each customer." *Id.* at A13. The court also found that technological advances in computers and automated accounting systems "have greatly alleviated the administrative burdens created by [a use tax] collection duty." *Id.* at A26.

The court next observed that "the legal landscape [has] been altered in th[e] quarter-century" since *Bellas Hess* was decided. Pet. App. A13 (footnote omitted). The court below explained that, in the intervening period, this Court abandoned the "formalism" that previously had characterized decisions under the Commerce Clause. *Id.*

at A14; see *id.* at A15-A19. The state court also noted that this Court has "significantly broadened the closely related Due Process analysis in personal jurisdiction cases" (*id.* at A19), recognizing that "technological advances have made physical presence within the jurisdiction meaningless in modern commerce." *Id.* at A20. With this in mind, the court below held that "Quill's asserted lack of physical presence is not fatal to the State's attempt to require Quill to collect and remit use tax on its sales into North Dakota." *Id.* at A25. Instead, the court concluded that "the concept of nexus encompasses more than mere physical presence within the state, and that the determination of nexus should take into consideration all connections between the out-of-state seller and the state, all benefits and opportunities provided by the state, and should stress economic realities rather than artificial benchmarks." *Id.* at A25-A26.

Applying this standard here, the court found that Quill's links to North Dakota—its continuous solicitation of the North Dakota market, lease of computer software to in-state customers, disposal of catalogs in the State, and contacts with North Dakota financial institutions to check credit information—established sufficient nexus to support use tax liability. Pet App. A28-A35. The court also concluded "that the State provides benefits, services, and opportunities which significantly aid Quill's business and which are related to the use tax." *Id.* at A36. It accordingly rejected petitioner's claims under the Commerce and Due Process Clauses and held that Quill must collect and remit the use tax. *Id.* at A36.

SUMMARY OF ARGUMENT

1. The physical presence requirement that Quill draws out of *Bellas Hess* cannot be reconciled with this Court's modern decisions under the Commerce and Due Process Clauses. *Bellas Hess* expressly grounded its rule on the view, enunciated in decisions such as *Freeman* v. *Hewit*, 329 U.S. 249 (1946), that the Commerce Clause precludes most state taxation of interstate transactions. But the Court's landmark ruling in *Complete Auto Transit*,

Inc. v. *Brady*, 430 U.S. 274 (1977), flatly repudiated that approach, holding that interstate businesses have no special immunity from state taxation. The *Bellas Hess* rule cannot survive that conclusion.

Quill's argument that direct marketers will find it expensive and inconvenient to comply with North Dakota's use tax collection obligation—a contention that is, in any event, factually insupportable—does not dictate a departure from the *Complete Auto* approach. For obvious reasons, the Court never has held that compliance costs of the sort advanced by Quill invalidate state taxes; such a rule either would grant multistate enterprises complete state tax immunity or would require courts to make judgments about "acceptable" levels of taxpayer inconvenience that are wholly beyond their competence. Indeed, the physical presence rule contended for by Quill itself makes clear that administrative expenses are irrelevant in the Commerce Clause calculus: the Court has held that entities such as Sears, Roebuck & Co., and the National Geographic Society, which maintain a physical presence nationwide, must collect use taxes even though they face precisely the same administrative difficulties as does Quill.

2. The Due Process Clause also does not support the physical presence rule. The Court has held that a defendant's physical absence cannot defeat a State's exercise of adjudicatory jurisdiction; Quill thus could be haled into a North Dakota court if one of its products injured an in-state customer. There is no reason to suppose that the State nevertheless lacks the authority to impose a duty on Quill to collect a tax arising out of the same transaction—a duty that is considerably less burdensome than the requirement that Quill regularly appear in a distant jurisdiction's courts. To the contrary, the Court has held that the assertion of taxing and adjudicatory jurisdiction should be governed by the same standard. Quill has offered no authority, and no reason of policy, to depart from that conclusion.

3. The Court should disapprove the *Bellas Hess* physical presence rule. The rule's doctrinal underpinnings have been stripped away. It stands in considerable tension with rules applied by the Court in closely analogous due process and Commerce Clause settings. It creates irrational distinctions between physically absent direct marketers on the one hand and national retailers (such as Sears) on the other. And it grants direct marketers an enormous competitive advantage over local (and national) retailers that has no constitutional justification. In these circumstances, the Court should not reaffirm a defective constitutional rule that it might be beyond the power of Congress to correct.

ARGUMENT

There are several points that appear to be common ground between the parties in this case. *First*, although Quill conclusorily asserts that the North Dakota law imposes "cumulative and discriminatory" burdens on interstate commerce (Br. 34), it does not contend that the State's use tax fails the second or third prongs of the Commerce Clause test of *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279, 287 (1977), which respectively require that state regulations of interstate commerce be fairly apportioned and nondiscriminatory. Such a contention would, in any event, be insubstantial: the use and sales tax obligations imposed on in-state and out-of-state merchants by North Dakota are wholly equivalent, while a use tax collection requirement by definition poses no risk of discriminatory or malapportioned burdens. See *National Geographic*, 430 U.S. at 558. Similarly, Quill does not question "the principle that 'interstate commerce may be made to pay its own way.'" *Complete Auto*, 430 U.S. at 289 n. 15. See *id.* at 281, 288.

Second, notwithstanding its asserted lack of physical presence in the State, Quill plainly takes advantage of benefits and services provided by North Dakota. This seems self-evident. The State "runs mass transit and maintains public roads" that permit Quill's solicitation of orders and delivery of goods (*D.H. Holmes Co.* v. *Mc-*

Namara, 486 U.S. 24, 32 (1988)); it "supplies a number of other civic services" (*ibid.*) that make possible development of the pools of affluent consumers who purchase Quill's products; and it offers the "other advantages of civilized society" (*Goldberg* v. *Sweet*, 488 U.S. 252, 267 (1989)) that are essential for the operation of functioning markets. Quill sensibly does not deny that its business in North Dakota—and the profits that it draws from the State—are made possible by these state services. It thus is evident that the obligation imposed upon Quill by North Dakota is "tied to the earnings which the State * * * has made possible, insofar as government is the prerequisite for the fruits of civilization for which, as Mr. Justice Holmes was fond of saying, we pay taxes," *Wisconsin* v. *J. C. Penney Co.*, 311 U.S. 435, 446 (1940). This is enough to satify the fourth prong of the *Complete Auto* test, which requires a fair relation between the tax and the benefits provided by the State. See *Goldberg*, 488 U.S. at 266-267; *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 624, 627 (1981).

Third, it is plain that the Due Process Clause does not disable States from asserting their authority over out-of-state entities in circumstances that are closely analogous to those involved here. Most notably, the Court has held unequivocally in the area of *in personam* jurisdiction that a State's authority "may not be avoided merely because the defendant did not *physically* enter the forum State." *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 476 (1985) (emphasis in original). North Dakota courts thus could assert jurisdiction over Quill if, for example, an in-state purchaser brought suit because he was injured by one of the products that Quill shipped into the State. Again, Quill does not contend otherwise.

Against this background, a single, narrow question is presented here: whether an in-state physical presence is necessary to justify what otherwise would be a concededly constitutional exercise of North Dakota's taxing authority. And this question may be narrowed still further by considering the peculiar characteristics of the rule that

Quill draws from *Bellas Hess*. Although Quill suggests (Br. 28) that a "slight[]" presence would not support the assertion of a State's taxing jurisdiction, the decisions cited by Quill make plain that the in-state presence of even a *single* employee would be sufficient. See *National Geographic*, 430 U.S. at 557; *Standard Pressed Steel Co.* v. *Washington Dept. of Revenue*, 419 U.S. 560, 562 (1975).[3] That physical presence, moreover, need have nothing to do with the sales activity that gives rise to the use tax obligation. See *National Geographic*, 430 U.S. at 560-561. Quill therefore is contending for a purely formal rule under which the economic realities—here, the direct marketer's extensive and continuous exploitation of the in-state market—would be irrelevant; instead the presence or absence of what Professor Hartman has described as "a few 'warm bodies'" would be dispositive. Hartman, *Collection of the Use Tax on Out-of-State Mail Order Sales*, 39 Vand. L. Rev. 993, 1014 (1986).

In our view, Quill's rule cannot be reconciled with the Court's modern approach to the Commerce and Due Process Clauses. At least since the time of the decision in *International Shoe Co.* v. *Washington*, 326 U.S. 310, 319 (1945), the Court has affirmed that the due process nexus test "cannot be simply mechanical or quantitative." And the Court's Commerce Clause jurisprudence now involves a similarly "practical analysis" that looks to "economic realities." *Complete Auto*, 430 U.S. at 279. The wooden physical presence rule that Quill draws from *Bellas Hess* cannot survive application of these tests.

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[3] While Quill contends (Br. 28) that *National Geographic* rejected a test that would have hinged nexus on the "slightest presence" within the State, that characterization is not entirely accurate; the Court concluded that the taxpayer's in-state presence *in fact* was "much more substantial * * * than the expression 'slightest presence' connotes." 430 U.S. at 556.

I. THE *BELLAS HESS* PHYSICAL PRESENCE RULE CANNOT BE RECONCILED WITH THE COURT'S CURRENT COMMERCE CLAUSE AND DUE PROCESS DOCTRINE

At the outset, a certain lack of clarity in the *Bellas Hess* opinion presents a special difficulty for analysis; the Court failed to make explicit whether it meant its holding to rest on the Commerce Clause, the Due Process Clause, or both. For reasons explained by North Dakota (at Br. 15-17), we believe that *Bellas Hess* principally involved a construction of the Commerce Clause, a conclusion that is shared by most neutral commentators. See Hartman, *supra*, 39 Vand. Law. Rev. at 1004; Hellerstein, *Significant Sales and Use Tax Developments During the Past Half Century*, 39 Vand. L. Rev. 961, 984-985 (1986); Hellerstein, *State Taxation and the Supreme Court*, 1989 Sup. Ct. Rev. 223, 227 n.25. It is plain, however, that *neither* Clause supports Quill's physical presence requirement.

A. The Court Has Rejected The Commerce Clause Theory That Underlies *Bellas Hess*

Perhaps the most striking feature of the briefs offered by Quill and its *amici* is their almost total failure, over many hundreds of pages, to offer any principled Commerce Clause justification for the physical presence rule. With the exception of their arguments about the administrative expense of complying with North Dakota's tax collection requirements—a point addressed below—Quill and its *amici* suggest no Commerce Clause rationale for the physical presence requirement, and make no serious attempt to integrate that requirement into the rest of the Court's modern Commerce Clause doctrine. On examination, the reason for this omission comes clear: *Bellas Hess* rests on a reading of the Clause that the Court has since expressly repudiated.

1. Although there has been tension in the Court's Commerce Clause holdings over the years (see *Goldberg*, 488 U.S. at 259; *Complete Auto*, 430 U.S. at 278-279), at the time of the decision in *Bellas Hess* the Court generally

precluded taxation of multistate transactions unless the levy somehow could be characterized as falling on interstate commerce indirectly, as where there was some separable "local incident" that could serve as a peg for the exercise of state authority. See, *e.g.*, *Norton Co.* v. *Department of Revenue*, 340 U.S. 534, 537 (1951). See generally *Complete Auto*, 430 U.S. at 280. This rule found its most forceful expression in *Freeman* v. *Hewit*, 329 U.S. 249 (1946), where the Court invalidated a tax on the gross receipts from an interstate sale because the levy fell on "the very process of interstate commerce." *Id.* at 253. As the Court subsequently explained, *Freeman* "announced a blanket prohibition against any state taxation imposed directly on an interstate transaction." *Complete Auto*, 430 U.S. at 279. The rule applied in *Freeman*, as in cases that followed it such as *Spector Motor Service, Inc.* v. *O'Connor*, 340 U.S. 602 (1951), treated "direct tax[es] on interstate sales, even if fairly apportioned and nondiscriminatory, [as] unconstitutional *per se*." *Complete Auto*, 430 U.S. at 280. The *Freeman* approach thus deemed "irrelevant any consideration of the practical effect of the tax. The rule reflect[ed] an underlying philosophy that interstate commerce should enjoy a sort of 'free trade' immunity from state taxation." *Id.* at 278 (footnote omitted). See generally Lockhart, *A Revolution in State Taxation of Commerce?* 65 Minn. L. Rev. 1025 (1981).

Bellas Hess avowedly rested its approach to nexus on this understanding of the Commerce Clause. In language that directly echoed the *Freeman* rationale, the *Bellas Hess Court* premised its holding on the perception that "it is difficult to conceive of commercial transactions more exclusively interstate in character than the mail order transactions here involved." 386 U.S. at 759. Indeed, *Freeman* was the Commerce Clause authority principally cited by *Bellas Hess* (see *id.* at 756) en route to its conclusion that state and local governments have "no legitimate claim to impose 'a fair share of the cost of the local government'" on physically absent direct marketers (*id.*

at 760)—a judgment that presumably turned on the perceived illegitimacy of taxes that were not tied to local incidents.[4]

Complete Auto, however, swept away the underpinning for this analysis. That decision, which clarified and rationalized Commerce Clause jurisprudence, made plain that interstate businesses have no special immunity from state taxation. See 430 U.S. at 288. The Court there overruled *Spector*. *Id.* at 288-289. And while the *Complete Auto* Court had no occasion to address the factual holding of *Freeman*, it expressly rejected "the philosophy underlying [*Spector's*] rule" (*id.* at 288), noting with evident approval that "[t]he rule announced in *Freeman* was viewed in the commentary as a triumph of formalism over substance." *Id.* at 281. As the Court repeatedly has explained in the intervening years, *Complete Auto* thus renounced *Freeman*'s "formalistic approach" (*Trinova Corp.* v. *Michigan Dept. of Treasury*, 111 S. Ct. 818, 828 (1991)), abandoning "the abstract notion that interstate commerce 'itself' cannot be taxed by the States." *D.H. Holmes Co.*, 486 U.S. at 30.

The physical presence rule cannot survive the tack taken in *Complete Auto*. In place of the "formal[]" and "abstract" (some would say metaphysical) rule of *Freeman*, *Complete Auto* mandates use of a "practical analysis" (430 U.S. at 279) that asks the functional question "whether the tax produces a forbidden effect." *Id.* at 288. See, *e.g.*, *Goldberg*, 488 U.S. at 259-260 n.11. Here, of

[4] The rationale for the *Freeman* approach was the fear that "permit[ting] the states to tax interstate commerce itself would threaten unmanageable burdens on commerce." Lockhart, *supra*, 65 Minn. L. Rev. at 1131. *Bellas Hess* tracked that analysis precisely, expressing concern that the imposition of use tax collection obligations by many jurisdictions "could entangle National [Bellas Hess's] interstate business in a virtual welter of complicated obligations to local jurisdictions." 386 U.S. at 759-760. The Court's interest here seemingly was as much with the theoretical impropriety of taxing interstate commerce "itself" as with the actual administrative difficulty of complying with state law.

course, Quill recognizes that North Dakota's rule would *not* have such an effect so long as the direct marketer had some minimal physical presence in the State. And in the face of Quill's extensive, continuous contacts with North Dakota—as well as the substantial benefits that its direct marketing activities derive from the State—Quill's focus on the presence or absence of the occasional warm body has "no relationship to economic realities." *Complete Auto*, 430 U.S. at 279. See *id.* at 288. Here, the important "realities" are the innumerable (and expensive) state services that facilitate Quill's direct marketing business; by contrast, the benefits that North Dakota would provide to a single in-state employee are insubstantial.

It should be added that Quill is incorrect in asserting (Br. 29-33) that the Court has reaffirmed the *Bellas Hess* physical presence requirement in the years since *Complete Auto*. The Court has cited *Bellas Hess* on a handful of occasions for the proposition that there is *a* nexus requirement—a proposition that is confirmed by *Complete Auto* and with which we do not quarrel. See *Goldberg*, 488 U.S. at 263; *Commonwealth Edison*, 453 U.S. at 626. But in each case the Court distinguished *Bellas Hess* (or simply did not address the substance of the nexus requirement) and upheld state power to tax. See *Goldberg*, 488 U.S. at 260-268; *D.H. Holmes*, 486 U.S. at 33; *Commonwealth Edison*, 453 U.S. at 626; *National Geographic*, 430 U.S. at 559-562. Indeed, since deciding *Bellas Hess* the Court never has applied its physical presence rule. This authority hardly establishes the vitality of the *Bellas Hess* holding.[5]

[5] Even prior to *Bellas Hess*, the Court did not apply the physical presence rule; as *amici* National Governors' Association *et al.* note, the Court, while upholding jurisdiction to tax when the taxpayer was physically present, had no occasion to determine the status of the tax when the taxpayer was physically absent. (That is not surprising; the technology of the day made exploitation of distant markets difficult.) The only decision during that period invalidating a state use tax did not turn on the physical presence issue; instead, the Court drew a distinction between "active and aggressive operation

2. Quill's principal response to this argument—indeed, virtually its only response—is its contention that it would be expensive and inconvenient for direct marketers to comply with state and local use tax obligations. Br. 34-44. Initially, it should be noted that Quill's practical concerns in this regard are subsantially overstated. As North Dakota demonstrates (at Br. 43), by July 1992 fewer than 200 jurisdictions will impose use tax reporting requirements—and a direct marketer would assume even that many reporting obligations only if it solicited business repeatedly (and successfully) in every jurisdiction in the nation. Similarly, Quill's concern about the difficulty of calculating and collecting use taxes for many jurisdictions "vastly underestimates the skill of contemporary man and his machines" (*Bellas Hess*, 386 U.S. at 766 (Fortas, J., dissenting)); computer software that is available at modest expense greatly facilitates meeting the collection obligation. See North Dakota Br. 39-43. The proof of the pudding here is in the experience of national mail order operators such as Sears, Roebuck & Co., Montgomery Ward & Co., and the National Geographic Society—none of which have found it difficult to comply with use tax collection obligations, identical to those at issue in this case, that were upheld by this Court.[6]

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within a taxing state and the occasional delivery of goods sold at an out-of-state store with no solicitation other than the incidental effects of general advertising." *Miller Bros. Co.* v. *Maryland*, 347 U.S. 340, 347 (1954). The tax was voided because there "was no invasion or exploitaiton of the [taxing State's] consumer market" by the taxpayer. *Ibid.* It may be added, in any event, that the vitality of *Miller Bros.* is itself in doubt. See *National Geographic*, 430 U.S. at 563 (Blackmun, J., concurring in the result).

[6] The Court held that each of these entities, which maintained a physical presence in the taxing State, could be required to collect use taxes on their mail order sales. *National Geographic*, 430 U.S. at 562; *Nelson* v. *Sears, Roebuck & Co.*, 312 U.S. 359 (1941); *Nelson* v. *Montgomery Ward & Co.*, 312 U.S. 373 (1941). That physical presence, moreover, did not in any way alleviate the administrative burden of collecting the use tax. The Court assumed in *Sears* and *Montgomery Ward* that the local retailing operation

More fundamentally, however, administrative expenses of the sort that concern Quill are simply irrelevant in the Commerce Clause calculus. Even while the rule of *Freeman* held sway, this Court consistently explained that "[i]t was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business." *Western Live Stock* v. *Bureau of Revenue*, 303 U.S. 250, 254 (1938). See *Complete Auto*, 430 U.S. at 279, 288.[7] The reason for this approach is plain. There always will be costs to complying with tax laws in more than one State; a firm that has income-producing divisions in several jurisdictions will, for example, have to file several state income tax returns, and may as a consequence be forced to create a larger tax compliance department than those maintained by com-

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on the one hand, and the national mail order business on the other, were "separately administered." *National Geographic*, 430 U.S. at 560. See *Sears*, 312 U.S. at 364-365; *Montgomery Ward*, 312 U.S. at 375. And the Court in *National Geographic* held it irrelevant that the taxpayer's in-state activities were *wholly* unrelated to the mail order business. 430 U.S. at 560-562; see *id.* at 554 n.2. (The Court was able to uphold the taxes in *Sears* and *Montgomery Ward* on the theory that, "[w]hatever may be the inspiration for these mail order sales, however they may be filled, [the State] may rightly assume that they are not unrelated to [the taxpayer's] course of business in [the State]. They are nonetheless a part of that business though none of [the taxpayer's] agents in [the State] actually solicited or placed them." *Sears*, 312 U.S. at 364. The tax thus was sufficiently tied to local activity to satisfy a pre-*Complete Auto* Court. In *National Geographic* the Court abandoned any requirement that there be such a tie.) In addition, of course, a substantial number of other mail order firms are collecting use taxes without evident difficulty. See generally Morse & Zimmerman, *Efforts to Collect State Sales Tax on Interstate Mail-Order Sales: Recent State Legislation* (1990) (prepared for presentation to the National Conference of State Legislatures).

[7] The Court made this observation in rejecting the contention that firms should be relieved of the burden of paying nondiscriminatory and fairly apportioned taxes; the Court's comment obviously applies as well to the claim that firms could be relieved of the lesser burden flowing from the requirement that they collect a use tax from others.

parable firms that conduct business in only one State. But these sorts of compliance costs—which inevitably will be higher for businesses with multistate operations than for those that operate only intra-state—never have been thought to invalidate state income taxes on multistate companies.

The situation here is no different in principle. Indeed, in the use tax setting the Court *already* has rejected arguments from administrative convenience identical to those advanced by Quill. See *Sears*, 312 U.S. at 365 ("cost and inconvenience" irrelevant). That is hardly surprising: a contrary rule either would grant multistate enterprises complete state tax immunity or would require courts to make standardless judgments about "acceptable" levels of administrative inconvenience that are wholly beyond their competence. See *Commonwealth Edison*, 453 U.S. at 628.[8]

In fact, even on its own terms Quill's argument from administrative convenience does not support the *Bellas Hess* physical presence rule. As Quill recognizes, under the physical presence approach—and this Court's decisions in *National Geographic*, *Sears*, and *Bellas Hess* itself—States may impose use tax collection obligations on firms that fortuitously have a physical presence in the jurisdiction. Under that rule, national retailers such as Sears must collect use tax on mail order sales in every jurisdiction in the nation. Yet entities such as Sears and National Geographic face the same administrative burdens as do Quill and other physically absent direct mar-

[8] The situation here stands in contrast to cases where the state levy, while facially neutral, effectively taxes out-of-state businesses at rates higher than those imposed on in-state firms. That was so, for example, in *American Trucking Ass'ns, Inc.* v. *Scheiner*, 483 U.S. 266, 286 (1987), where a flat tax on trucks was found "plainly discriminatory" because it applied to trucks traveling in interstate commerce at a per mile rate approximately five times as heavy as that applied to local trucks. We are not aware of any decision in which the Court invalidated a tax because the administrative costs of compliance—rather than the tax itself—were alleged to be higher for interstate than for in-state firms.

keters in calculating and collecting use taxes. See note 6, *supra*. This makes clear that administrative expense cannot defeat use tax liability—and that the sole functional rationale advanced by Quill does not support its rule. It also, of course, confirms that the inconvenience of compliance could not have been the rationale for *Bellas Hess*. See note 4, *supra*.

It is worth adding that the premise of Quill's argument from administrative expense—that the imposition of use tax collection liabilities would create competitive inequalities between local and multistate businesses that do not now exist—is itself flawed. As an initial matter, the rule contended for by Quill would not protect interstate businesses generally; it would help a small group of retailers (physically absent direct marketers) and disadvantage both local *and* multistate retailers. In any event, it is the existing complete tax immunity of physically absent direct marketers that most profoundly distorts the marketplace. See Advisory Comm'n on Intergovernmental Relations, *State and Local Taxation of Out-of-State Mail Order Sales* 5 (1986) (hereinafter cited as "ACIR Report"); Hellerstein, *supra*, 39 Vand. L. Rev. at 982. Local retailers, of course, are obligated either to pass on sales taxes to their customers or to absorb the levies themselves. The competitive advantage that this gives physically absent direct marketers over local retailers (and over national retailers that maintain a physical presence in many jurisdictions) is substantial; with state sales taxes now levied at rates ranging from 2% to 7.5%, and with local governments imposing additional sales taxes at rates ranging up to 4.25% (see ACIR Report 23), the most widely accepted analyses indicate that every 1% increase in a jurisdiction's sales tax may reduce local sales by some 6%. Pet App. A65. See generally ACIR Report 38-40; Mowen, Wiener & Young, *Consumer Store Choice and Sales Taxes: Retailing, Public Policy, and Theoretical Implications*, 66 J. Retailing 222, 234-235, 238 (1990). Nothing in the Commerce Clause, which was not intended to "place [interstate]

commerce in a privileged position" (*Commonwealth Edison*, 453 U.S. at 623), requires such a result.

3. These observations raise the question whether nexus should properly be part of the Commerce Clause inquiry at all. Although often suggesting that an equivalent nexus test is applicable under the Commerce and Due Process Clauses, the Court has said surprisingly little about the policies served by a Commerce Clause nexus requirement. It appears that the only clear Commerce Clause justification for the nexus inquiry offered by a Member of the Court was Justice Rutledge's pre-*Complete Auto* suggestion that the use of a "local incident" as a hook for taxation could act as "a safeguard, to some extent, against repetition of the same or a similar tax by another state." *Freeman*, 329 U.S. at 271 (Rutledge, J., concurring). But that concern is now addressed directly by the apportionment prong of the *Complete Auto* test, which—without regard to nexus—serves to "ensure that each State taxes only its fair share of an interstate transaction." *Goldberg*, 488 U.S. at 260-261. And in any event, in the particular use tax context at issue here, the Court has explained that "[t]he out-of-state seller runs no risk of double taxation" because it "becomes liable for the tax only by failing or refusing to collect the tax from th[e] resident consumer." *National Geographic*, 430 U.S. at 558.[9]

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[9] Prior to the decision in *Bellas Hess*, the Court generally discussed nexus under the rubric of the Due Process Clause. See, *e.g.*, *J.C. Penney*, 311 U.S. at 444; *International Shoe*, 326 U.S. at 320. Cf. *Scripto, Inc.* v. *Carson*, 362 U.S. 207 (1960) (Court discusses nexus in Commerce and Due Process Clause challenge without separately addressing provisions). So far as we are aware, the Court first separately stated a Commerce Clause nexus requirement in *General Motors Corp.* v. *Washington*, 377 U.S. 436 (1964), a pre-*Complete Auto* decision in which the majority held that the taxpayer, to escape taxation, was required to show that the operations subject to the levy were "dissociated from the local business and interstate in nature." *Id.* at 441 (citation omitted). In conducting this search for local activity, the Court continued, "[w]e must determine whether [the tax] is so closely related to the local activities of the corporation as to form 'some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.'" *Id.* at 448, quoting *Miller Bros.*, 347 U.S. at 344-345. The Court thus equated the pre-*Complete Auto* Commerce Clause requirement of a "local incident" with the due process minimum contacts test. This approach was challenged by Justice Brennan, who maintained that the minimum contacts requirement "was formulated to meet the quite different problem of defining the requirements of the Due Process Clause." *Id.* at 450 (Brennan, J., dissenting). Justice Goldberg also dissented, arguing that notions of fairness are unrelated to the apportionment concerns at which the Commerce Clause is directed. See *id.* at 457-462 (Goldberg, J., dissenting). The Court has since endorsed Justice Goldberg's *General Motors* dissent (see *Tyler Pipe Industries, Inc.* v. *Washington State Dept. of Revenue*, 483 U.S. 232, 241-242 (1987))—making the decision a questionable prop for the nexus requirement.

For its part, Quill offers remarkably little in the way of a justification for the Commerce Clause nexus requirement. It does suggest that a nexus rule protects "the national economy" because "*it is the activities or presence of the taxpayer in the State* that may properly be made to bear a 'just share of state tax burden.'" Br. 11-12, quoting *Commonwealth Edison*, 453 U.S. at 626 (emphasis added by Quill). Again, however, this concern is addressed through the second and fourth prongs of the *Complete Auto* test. And certainly, it is not a mail order firm's in-state *physical* presence that serves as the acceptable measure of the state tax burden; the use tax obligation imposed on a physically present direct marketing firm (such as, for example, National Geographic or Sears) is measured by mail order sales that are wholly unrelated to the firm's in-state property.

Having said this, there is no need for the Court to consider here whether nexus is appropriately addressed under the rubric of the Commerce Clause. It is enough to note that Quill has entirely failed to explain why physical presence—rather than purposeful and continuous economic exploitation of the in-state market—should be necessary to trigger tax collection liability.

B. The Due Process Clause Does Not Impose A Physical Presence Requirement

1. The concept of nexus does have historic roots in due process; for over a century, the Due Process Clause has been understood to require connections between the forum and the out-of-state individual against whom the State seeks to assert its adjudicatory or taxing authority. See, *e.g.*, *Pennoyer* v. *Neff*, 95 U.S. 714, 733 (1878) (adjudicatory jurisdiction); *Louisville & Jeffersonville Ferry Co.* v. *Kentucky*, 188 U.S. 385, 398 (1903) (taxing jurisdiction). And since the time of the decision in *International Shoe*, due process has been understood to require "certain minimum contacts with [the State] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe*, 326 U.S. at 316 (citation omitted). The Court also has indicated that "the taxing power exerted by the state" must "bear[] fiscal relation to protection, opportunities and benefits given by the state." *J. C. Penney*, 311 U.S. at 441-442. But (with the arguable exception of *Bellas Hess* itself) Quill is wholly without support in jumping from these standards to the conclusion that *physical presence* in the jurisdiction is necessary to make out the required connection.

To the contrary, the Court has made clear in the context of personal jurisdiction that a State's authority

> may not be avoided merely because the defendant did not *physically* enter the forum State. * * * [I]t is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted. So long as a commercial actor's efforts are "purposefully directed" toward residents of another State, [the Court] ha[s] consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there.

Burger King Corp. v. *Rudzewicz*, 471 U.S. 462, 476 (1985) (emphasis in original). See *Asahi Metal Industry Co.* v. *Superior Court*, 480 U.S. 102, 109-110 (1987) (opinion of O'Connor, J.); *id.* at 117-120 (Brennan, J., concurring in part and concurring in the judgment); *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 297-298 (1980). Under these precedents, as we explain at the outset, North Dakota courts plainly could assert jurisdiction over Quill if it were sued by an in-state customer. See *Burger King*, 471 U.S. at 473; Pet. App. A24. There is no reason to suppose that the State nevertheless lacks authority to impose a duty to collect a tax on Quill arising out of the same transaction.

Citing Justice Douglas's concurring opinion in *Travelers Health Ass'n* v. *Virginia*, 339 U.S. 643, 653-654 (1950), Quill nevertheless insists that *in personam* and taxing jurisdiction are governed by different standards. See Br. 33-34. The short answer to this contention is that the Court held in *International Shoe* itself—which was both a personal jurisdiction and a jurisdiction to tax case (see *Shaffer* v. *Heitner*, 433 U.S. 186, 203 (1977))—that due process objections to personal jurisdiction and to state taxing authority must be judged by the same standard: "The activities which esablish [the taxpayer's] 'presence' subject it alike to taxation by the state and to suit to recover the tax." 326 U.S. at 321. And that is hardly surprising, since the same "minimum contacts" formula is the touchstone in each setting. Compare, *e.g.*, *Burger King*, 471 U.S. at 474; *World-Wide Volkswagen*, 444 U.S. at 291; *International Shoe*, 326 U.S. at 316, with *National Geographic*, 430 U.S. at 561; *Miller Brothers*, 347 U.S. at 345.[10]

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[10] In *Travelers* itself, the majority upheld a State's application of its Blue Sky law to a physically absent mail order insurance company, rejecting "[m]etaphysical concepts of 'implied consent' and 'presence'" (339 U.S. at 649) while using the *International Shoe* standard. See *id.* at 648. As for Justice Douglas, shortly after issuing his opinion in *Travelers* he dissented from the Court's invalidation of the Maryland use tax at issue in *Miller Bros.*; citing the holding in *Pennoyer*, Justice Douglas concluded that, so long as the State could assert adjudicatory jurisdiction over the seller's property, "I see nothing in the Due Process Clause which would prevent

In fact, there is no functional distinction between the assertion of adjudicatory and taxing jurisdiction that dictates the use of different standards in the two settings. When an out-of-state defendant is required to appear in court to answer, for example, a product liability claim, the defendant is judged according to the forum's law and will be found liable if it failed to comply with the forum's standards. See *Allstate Insurance Co.* v. *Hague*, 449 U.S. 302, 311-313 (1981) (opinion of Brennan, J.); *Restatement (Second) of Conflict of Laws* §§ 6, 9 (1971). Cf. *Burger King*, 471 U.S. at 477. And as this Court has recognized, amenability to suit inevitably will lead to compliance with the rules developed by the forum to regulate conduct, at least if the defendant regularly conducts business in the jurisdiction. See, *e.g.*, *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 246-247 (1959); *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 495, 498-499 n.19 (1987); *Restatement (Second) of Torts* § 4 (1965); W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser & Keeton on the Law of Torts* 25 (5th ed. 1984). Because compelled compliance with the forum's standards is a necessary consequence of the assertion of long-arm jurisdiction, a contact that satisfies traditional notions of fair play for adjudicatory purposes should do so as well when, as here, the State seeks to impose an essentially regulatory tax collection burden.

Similarly, there is no reason that the individual's interest in escaping arbitrary state action—the concern that underlies the due process jurisdictional limits (see *Burger King*, 471 U.S. at 472 n.13; *Insurance Corp. of Ireland* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702-703 n.10 (1982))—should dictate the application of different standards to assertions of adjudicatory authority on the one hand and taxing or regulatory authority on the other. So long as the tax (or the regulation) bears the appropriate relation to values or opportunities provided by the State, it is difficult to see why

Maryland from making [the seller] a collector for taxes." 347 U.S. at 358 (Douglas, J., dissenting).

notions of fundamental fairness require a closer connection to tax (or to regulate) than to compel the defendant's appearance in court. To the contrary, regularly collecting use taxes on mail order sales is considerably *less* burdensome than regularly appearing in court in a distant jurisdiction. Indeed, the Court already seemingly has reached this conclusion, holding in one important circumstance that lesser connections support taxation than are necessary for adjudication: the presence of the defendant's property in the State does not support jurisdiction over an unrelated cause of action (see *Rush* v. *Savchuk*, 444 U.S. 320, 328 (1980); *Shaffer*, 433 U.S. at 209), but does, under *National Geographic*, permit the imposition of use tax obligations on transactions that are unrelated to the property. It therefore would be anomalous to hold here that more substantial connections are needed to tax than to assert *in personam* jurisdiction.[11]

And the connections here surely are substantial enough to make it fair for North Dakota to assert jurisdiction over Quill. It is apparent from the record—indeed, it is

[11] Quill asserts (Br. 33-34) that the *Bellas Hess* Court implicitly rejected an equivalence between the taxing and adjudicatory standards when it failed to apply (or even to cite) adjudicatory decisions such as *McGee* v. *International Life Insurance Co.*, 355 U.S. 220 (1957), which upheld the exercise of state jurisdiction over physically absent defendants. That manifestly is not so, however. Almost contemporaneously with the decision in *Bellas Hess*, the Court dismissed for want of substantial federal questions two appeals in which state courts had upheld the exercise of state taxing and regulatory authority against out-of-state mail order insurance companies. *People* v. *United National Insurance Co.*, 427 P.2d 199 (Cal.), *app. dismissed*, 389 U.S. 330 (1967); *Ministers Life & Casualty Union* v. *Haase*, 141 N.W.2d 287 (Wisc.), *app. dismissed*, 385 U.S. 205 (1966). The standards applied by the state courts in those decisions "were identical to the Supreme Court standards for judicial jurisdiction." McCray, *Overturning* Bellas Hess: *Due Process Considerations*, 1985 B.Y.U.L. Rev. 265, 288. Because these summary rulings involved only the Due Process Clause (Congress having lifted dormant Commerce Clause restrictions on the insurance business in the McCarran-Ferguson Act), this background suggests, if anything, that *Bellas Hess* rests principally on the Commerce Clause.

apparent from the 24 tons of catalogs that Quill annually directs to North Dakota (see Pet. App. A3)—that Quill systematically, continuously, and purposefully solicits North Dakota customers. This activity is, of course, "significantly associated with the taxpayer's ability to establish and maintain a market in th[e] state for the sales." *Tyler Pipe*, 483 U.S. at 250. And needless to say, Quill's products are purposefully directed into North Dakota. In these circumstances, the use tax collection obligation "bears fiscal relation to protection, opportunities and benefits given by the state." *J.C. Penney*, 311 U.S. at 444. In such a case, "[t]he simple but controlling question is whether the state has given anything for which it can ask return" (*ibid.*); here, it plainly has.

II. THE COURT SHOULD REJECT THE *BELLAS HESS* PHYSICAL PRESENCE RULE

This review of the law makes clear, in our view, that the doctrinal underpinnings of *Bellas Hess* have been stripped away. The decision (and the rationales advanced for it) stand in considerable tension with the rules applied by the Court in closely analogous due process and Commerce Clause settings. The *Bellas Hess* rule creates an irrational and inequitable distinction between physically absent direct marketers on the one hand and national retailers such as Sears and National Geographic on the other. And it grants direct marketers an unfair competitive advantage over local (and national) retailers that has no discernible basis in the Constitution. In these circumstances, the Court should overrule *Bellas Hess* to the extent that it establishes physical presence as a prerequisite for the exercise of state taxing authority.

Overruling a decision, of course, is not a step that the Court takes lightly. At the same time, however, "when governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.' *Smith* v. *Allwright*, 321 U.S. U.S. 649, 665 (1944). *Stare decisis* is not an inexorable command; rather, it 'is a principle of policy and not a mechanical formula of adherence to the latest decision.' *Helvering* v.

Hallock, 309 U.S. 106, 119 (1940)." *Payne* v. *Tennessee*, 111 S. Ct. 2597, 2609-2610 (1991) (parallel cites omitted). See *id.* at 2617-2618 (Souter, J., concurring). In particular, the Court has not hesitated to disapprove rulings that were "decided before some important developments in the constitutional law" (*Alabama* v. *Smith*, 490 U.S. 794, 802 (1989)) and therefore "do not fit into [the Court's current] analytical framework." *Collins* v. *Youngblood*, 110 S. Ct. 2715, 2721 (1990). See, *e.g.*, *Healy* v. *Beer Institute, Inc.*, 491 U.S. 324, 343 (1989); *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 480 (1989). Perhaps the most notable examples of this practice followed the watershed holding in *Complete Auto* itself, in whose wake the Court overruled or otherwise disapproved some eight decisions (not including *Spector*, which was overruled in *Complete Auto*).[12] In this setting, it would be a *refusal* to reject the pre-*Complete Auto* rule of *Bellas Hess* that would be extraordinary.

In response to this point, Quill and some of its *amici* suggest that the matter of *Bellas Hess* should be left to Congress. But as the decisions following *Complete Auto* make clear, the possibility of congressional action never has kept the Court from maintaining consistency in its Commerce Clause decisions. Equally to the point, Quill also argues that *Bellas Hess* rests on the Due Process Clause—and the Court has expressly left open the question whether Congress has the authority to set aside de-

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[12] See *Department of Revenue* v. *Ass'n of Washington Stevedoring Cos.*, 435 U.S. 734 (1978), ov'g *Puget Sound Stevedoring Co.* v. *State Tax Comm'n*, 302 U.S. 90 (1937), and *Joseph* v. *Carter & Weekes Stevedoring Co.*, 330 U.S. 422 (1947); *Commonwealth Edison*, 453 U.S. at 617, disapproving *Heisler* v. *Thomas Colliery Co.*, 260 U.S. 245 (1922); *Scheiner*, 483 U.S. at 292-296, disapproving reasoning of *Aero Mayflower Transit Co.* v. *Board of Railroad Commrs.*, 332 U.S. 495 (1947), and *Aero Mayflower Transit Co.* v. *Georgia Public Service Comm'n*, 295 U.S. 285 (1935); *Goldberg*, 488 U.S. at 265 n.16, departing from holdings of *Cooney* v. *Mountain States Tel. & Tel. Co.*, 294 U.S. 384 (1935), *Western Union Tel. Co.* v. *Pennsylvania*, 128 U.S. 39 (1888), and *Ratterman* v. *Western Union Tel. Co.*, 127 U.S. 411 (1888).

cisions in this area that are grounded on that Clause. See *ASARCO, Inc.* v. *Idaho State Tax Comm'n*, 458 U.S. 307, 327-328 n.23 (1982); *id.* at 331 (O'Connor, J., dissenting). Indeed, several of Quill's *amici*, arguing that Congress lacks the constitutional authority to modify *Bellas Hess*, successfully opposed congressional action that would have authorized the States to require use tax collection.[13] Arguments relating to the institutional role of Congress thus come from North Dakota's opponents with diminished force.

In any event, the arguable presence of due process considerations here makes it unclear whether Congress could remedy the problems caused by the *Bellas Hess* rule. Yet it is plain that, if the Court overturns *Bellas Hess*, Congress could *protect* direct marketers (by, for example, mandating use of a uniform tax rate by state and local governments) in the unlikely event that the administrative problems posed by Quill prove insuperable. Indeed, Congress took just such a step in Pub. L. No. 86-272, codified at 15 U.S.C. 381, the statute at issue in *Wisconsin Department of Revenue* v. *William Wrigley, Jr., Co.*, No. 91-119. In these circumstances, prudence suggests that the Court hestitate before reaffirming a defective constitutional rule that it might be beyond the power of Congress to correct.

At the same time, the reliance interests advanced by Quill and its *amici* are not substantial. While there may be doubt about the validity of a law setting aside the

[13] See *Interstate Sales Tax Collection Act of 1987 and the Equity in Interstate Competition Act of 1987: Hearings on H.R. 1242, H.R. 1891, and H.R. 3521 before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 100th Cong., 2d Sess. 74-79 (1988) (prepared statement of Lucas A. Powe, Jr., on behalf of Direct Marketing Association and Magazine Publishers Association); *Collection of State Sales and Use Taxes by Out-of-State Vendors, Hearing on S. 639 and S. 1099 before the Subcomm. on Taxation and Debt Management of the Senate Comm. on Finance and Taxation*, 100th Cong., 1st Sess. 43-44 (1988) (statement of Lucas A. Powe, Jr., on behalf of the National Marketing Association, Inc.).

physical presence rule, direct marketers have been aware for some years that Congress might enact such legislation.[14] And they surely also are aware—given the Court's reservation of the issue in *ASARCO*—that such a law might be sustained. At the least, then, disapproval of *Bellas Hess* (whether by Congress or this Court) hardly could come as a complete surprise. Quill's interest in continuing to benefit from an inequitable tax preference accordingly cannot outweigh society's overriding concern with the consistency of this Court's constitutional doctrine.

In all, the *Bellas Hess* rule was controversial from its inception: Justice Fortas, writing for three Members of the Court, had "no doubt" at the time that "large-scale, systematic, continuous solicitation and exploitation of the [in-state] consumer market is a sufficient 'nexus'" to support tax liability. 386 U.S. at 761 (Fortas, J., dissenting). Cf. *Payne*, 111 S. Ct. at 2611 (noting relevance of "spirited dissents challenging the basic underpinnings" of a decision). In the years since the *Bellas Hess* decision, its physical presence rule never has been applied in a holding of this Court. That rule creates irrational distinctions in practice and is insupportable as a matter of theory. It should not be reaffirmed.

[14] Bills that would modify *Bellas Hess* have been introduced several times in recent years. See, *e.g.*, H.R. 2230, 101st Cong., 1st Sess., 135 Cong. Rec. H1662 (daily ed. May 4, 1989); S. 480, 101st Cong., 1st Sess., 135 Cong. Rec. S1913 (daily ed. Mar. 1, 1989); H.R. 3521, 100th Cong., 1st Sess., 133 Cong. Rec. H8916 (daily ed. Oct. 27, 1987).

CONCLUSION

The judgment of the North Dakota Supreme Court should be affirmed.

Respectfully submitted,

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IN THE

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QUILL CORPORATION,
Petitioner,

v.

STATE OF NORTH DAKOTA,
By and Through its Tax Commissioner,
HEIDI HEITKAMP,
Respondent.

On Writ of Certiorari to the Supreme Court of North Dakota

BRIEF OF THE NATIONAL GOVERNORS' ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, U.S. CONFERENCE OF MAYORS, AND NATIONAL LEAGUE OF CITIES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether North Dakota Cent. Code § 57-40.2-01(7) violates the Commerce Clause by imposing on businesses engaging in "regular or systematic solicitation" of sales in North Dakota the duty to collect a use tax on sales made to consumers in the State.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

No. 91-194

QUILL CORPORATION,
Petitioner,
v.
STATE OF NORTH DAKOTA,
By and Through its Tax Commissioner,
HEIDI HEITKAMP,
Respondent.

On Writ of Certiorari to the Supreme Court of North Dakota

BRIEF OF THE NATIONAL GOVERNORS' ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, U.S. CONFERENCE OF MAYORS, AND NATIONAL LEAGUE OF CITIES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States. They and their members have a compelling interest in legal issues that affect state and local governments, including questions of taxing author-

ity. The question presented in this case is the validity of a North Dakota statute that imposes use tax collection obligations on businesses that engage in "regular or systematic solicitation" of sales in North Dakota. At least 34 States have enacted similar legislation. *See* National Conference of State Legislatures, *et al.*, Br. *Am. Cur.* on Pet. 7-8 & nn. 6-7. Tax revenue losses totalling billions of dollars per year are at stake. *See* Advisory Comm'n on Intergovernmental Relations, *State Taxation of Interstate Mail-Order Sales: Revised Revenue Estimates, 1990-1992* (1991). *Amici* accordingly submit this brief to assist the Court in the resolution of this case.[1]

STATEMENT

Amici adopt respondent's statement of the case.

INTRODUCTION AND SUMMARY OF ARGUMENT

A. Petitioner Quill's sole objections to the collection duty imposed by the statute in this case—that Quill need not bear the duty either because Quill is not physically present in North Dakota or because the administrative costs of compliance are too great—rest on *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967). The case now before the Court puts at issue the power of the *Bellas Hess* decision to support either of these objections.

First, this Court's Commerce Clause jurisprudence has evolved dramatically since 1967. The critical moment for purposes of this case came ten years after *Bellas Hess*. In *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977), the Court recognized that the formalism of its Commerce Clause doctrine no longer bore any "relationship to economic realities," and obstructed rather than facilitated the mechanics of the federal system. The Court determined that it could more effectively coordinate

[1] The parties' letters of consent have been filed with the Clerk pursuant to Rule 37.2 of the Court.

the federal machinery by adopting a pragmatic approach. Under that approach, a tax runs afoul of the Commerce Clause if it is imposed on an actor or activity lacking "sufficient nexus" with the State; if it discriminates against interstate commerce, or is unfairly apportioned; or if it is unrelated to the services provided by the State. *See id.* at 277-78, 287.

The *Complete Auto* test rejected the tenet which had long frozen state taxing power—that taxation of "the privilege of engaging in interstate commerce" was *per se* unconstitutional. 430 U.S. at 278. The conclusion of *Complete Auto*'s realistic approach was instead that " 'interstate commerce may be made to pay its way' " when properly and fairly taxed by States with jurisdiction. *Id.* at 281, 288-89. Since 1977, this Court's commitment to the "consistent and rational method of inquiry" adopted in *Complete Auto* has led it to overturn numerous earlier cases and to impose liabilities on a number of industries within the scope of newly operating state authority.[2] *Mobil Oil Corp. v. Comm'r of Taxes*, 445 U.S. 425, 443 (1980).

The second reason that the power of *Bellas Hess* warrants reevaluation is that the decision was idiosyncratic even in its time, and now has increasingly aberrant effects. One of the last and most formalistic expressions

[2] *See, e.g., Department of Revenue v. Association of Washington Stevedoring Cos.*, 435 U.S. 734 (1978) (overruling *Puget Sound Stevedoring Co. v. State Tax Comm'n*, 302 U.S. 90 (1937) and *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422 (1947)); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981) (disapproving of *Heisler v. Thomas Colliery Co.*, 260 U.S. 245 (1922)); *American Trucking Ass'n, Inc. v. Scheiner*, 483 U.S. 266, 292-296 (1987) (disapproving of reasoning of *Aero Mayflower Transit Co. v. Board of R.R. Comm'rs*, 322 U.S. 495 (1947) and *Aero Mayflower Transit Co. v. Georgia Pub. Serv. Comm'n*, 295 U.S. 285 (1935)); *Goldberg v. Sweet*, 109 S. Ct. 582, 591 n.16 (1989) (departing from *Cooney v. Mountain States Tel. & Tel. Co.*, 294 U.S. 384 (1935)); *cf. Hughes v. Oklahoma*, 441 U.S. 322 (1979) (overruling *Geer v. Connecticut*, 161 U.S. 519 (1896)).

of the "interstate immunity" rule described above, *Bellas Hess* sounded a discordant note against this Court's underlying conviction that the Commerce Clause should be applied in a practical manner and with cognizance that it was not intended to relieve those doing business in a number of States "'from their just share of [the] state tax burden even though it increases the cost of doing business.'" *Complete Auto*, 430 U.S. at 279 (quoting *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938)).[3]

Notably formalistic at its point of origin, *Bellas Hess* has become plainly anachronistic. As fully developed by respondent (Resp. Br. 7-10), the contemporary "direct market" bears little resemblance to the business activity typified by the "mail or common carrier" contacts at issue in *Bellas Hess*. 386 U.S. at 754. It is therefore nonsensical to assert that this case is "factually indistinguishable" from *Bellas Hess*. Pet. i. Even if Quill could contrive to carry on business "without regard to . . . the technological advances of the past thirty years" (*id.* at 25), it does not follow that this Court can ground constitutional doctrines on that anomaly.[4]

It is no answer to say, as do Quill and its *amici*, that everyone involved has learned to operate with certain gears of the interstate marketplace frozen. Institutionalizing an anomalous doctrine is no substitute for providing the coherence, rationality, or predictability that best serves all concerned. More to the point constitutionally,

[3] *See, e.g., Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 457 (1959); *General Trading Co. v. State Tax Comm'n*, 322 U.S. 335, 349-362 (1944) (Rutledge, J., concurring); *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359, 363 (1941).

[4] As the Court put it in *Trinova Corp. v. Michigan Dep't of Treasury*, 111 S. Ct. 818, 828 (1991), the principles that govern the validity of state taxes must "seek to accommodate the necessary abstractions of tax theory to the realities of the marketplace." For an example of such an approach in changing technological circumstances, *see Goldberg v. Sweet*, 109 S. Ct. 582 (1989).

the Commerce Clause is meant to coordinate, not stymie, the federal system. It does not "eclipse the reserved 'power of the States to tax'"—a power essential to States' abilities to meet the needs of their citizens—when that power operates in its rightful sphere. *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 328 (1977) (quoting *Gibbons v. Ogden*, 9 Wheat. 1, 199 (1824)).

B. By establishing the *Complete Auto* test as the standard for Commerce Clause challenges to state taxation, this Court has simplified the task of reviewing the validity of the state collection duty imposed in this case and with it the continuing validity of *Bellas Hess*. *Amici* therefore apply the test here, as this Court has done when revisiting precedents decided in the "pre-*Complete Auto* era." *Goldberg*, 109 S. Ct. at 591 n.16; *see* note 2, *supra*.

The following discussion devotes especial attention to the first prong of the *Complete Auto* test, the requirement that a State tax only those with "sufficient nexus" to the State, because it is that prong that Quill claims must be limited by the interpretation concretized in *Bellas Hess*. Analysis of this Court's precedents demonstrates, however, that "nexus" has long been defined in essentially functional terms: the question is whether a seller has "'establish[ed] and maintain[ed] a market'" in the State. *Tyler Pipe Indus., Inc. v. Washington Dep't of Revenue*, 483 U.S. 232, 250 (1987). The fact of physical presence, while relevant as an indicator of activity in the State, has never been dispositive. Moreover, the reasons for its importance in *Bellas Hess* were rendered obsolete by *Complete Auto*. In fact, evolution towards expressly functional tests has been a hallmark of Commerce Clause jurisprudence, and characterizes as well the development of the nexus standard in adjudicatory jurisdiction. The fact that the State here imposes a collection duty alone strengthens the arguments for a functional standard because a collection duty is less oppressive than a direct tax.

The collection duty imposed here satisfies as well the remaining prongs of the *Complete Auto* test. It is fairly apportioned because no more than one State can demand that a seller collect tax on the same sale. The duty is also nondiscriminatory because it is matched by a duty imposed on in-state sellers to collect the same amount of sales tax. Finally, the duty is reasonably related to benefits obtained from the State because the duty is proportionately imposed: a seller collects only on as many sales as it has made. Under no prong do the administrative costs of collecting the tax change the calculus.

Because Quill and its *amici* have relied to an inordinate extent on the argument that the administrative costs of collecting use tax render that duty unconstitutional, this brief concentrates in its second part on that contention. The "administrative costs" argument rests on the discredited "interstate immunity" theory under which interstate commerce avoids paying the costs of carrying on multistate business. In fact, even in the era of "interstate immunity," the Court developed exceptions under which it has already rejected the "administrative costs" argument made here. *See, e.g., Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359 (1941). In addition, Quill's argument asks this Court to police the administrative costs of tax compliance by using federal constitutional law. The role is an improper one for the Court because it involves determinations concerning highly fact-specific issues of state fiscal policy. Lastly, *amici* note that Quill's "administrative cost" assertions are not only irrelevant to the legal inquiry required here, they are also overinflated in fact.

ARGUMENT

I. NORTH DAKOTA'S IMPOSITION OF THE DUTY TO COLLECT USE TAX IS CONSTITUTIONAL ACCORDING TO THE STANDARD ADOPTED IN *COMPLETE AUTO TRANSIT, INC. v. BRADY*

The *Complete Auto* test both incorporates the dictates of the Commerce Clause and "encompasses as well the Due Process requirement that there be 'a minimal connection between the interstate activities and the taxing State, and a rational relationship between the income attributed to the State and the intrastate values of the enterprise.'" *Trinova Corp.*, 111 S. Ct. at 828 (quoting *Mobil Oil Corp. v. Comm'r*, 445 U.S. at 436-37); *see also Amerada Hess Corp. v. Director, Div. of Taxation*, 109 S. Ct. 1617, 1625 (1989). The Due Process elements of the Commerce Clause inquiry, formerly analyzed as part of the issue whether a State had jurisdiction to tax,[5] now constitute the first and fourth prongs of the *Complete Auto* test. North Dakota's statute neither deprives Quill of due process of law, nor violates those purely Commerce Clause mandates of fair apportionment and nondiscrimination expressed in the second and third prongs of the test.

A. Sufficient Nexus Exists Here Because Quill Took Directed Action To Establish and Maintain a Market in the State

1. *The Functional Core of the Nexus Requirement*

The first prong of *Complete Auto* requires that there be a "sufficient nexus" or "minimal connection" between the interstate activities and the taxing State. *Complete Auto*, 430 U.S. at 278; *Mobil Oil*, 445 U.S. at 436-37. As the

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[5] *See, e.g., Braniff Airways v. Nebraska State Bd.*, 347 U.S. 590, 598-99 (1954); *Memphis Gas Co. v. Stone*, 335 U.S. 80, 96-97 (1948) (Rutledge, J., concurring), *quoted in Complete Auto*, 430 U.S. at 282.

Court originally framed the inquiry, a State cannot reach a party unless "he have certain minimum contacts with it" so that the exercise of state taxing power "does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

The question whether "nexus" or "minimal connection" exists between a party and a State requires, in its essence, a functional inquiry. This Court has already determined that the "requisite 'nexus'" for Commerce Clause purposes is supplied if a corporation "avails itself of the 'substantial privilege of carrying on business' within the State." *Mobil Oil*, 445 U.S. at 437 (quoting *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444-445 (1940)). In another recent case, the Court identified "the crucial factor governing nexus" as "'whether the activities performed in this state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in this state for the sales.'" *Tyler Pipe*, 483 U.S. at 250 (citation omitted).

This Court's reasoning in jurisdiction to tax cases has long reduced to precisely such a functional core. *See, e.g., Scripto, Inc. v. Carson*, 362 U.S. 207, 211 (1960) ("The test is simply the nature and extent of the activities" of a party in the State.); *International Shoe*, 326 U.S. at 320 (sufficient contact where party carried on "systematic and continuous [activities]" resulting in interstate business); *J.C. Penney*, 311 U.S. at 444 (nexus exists if "the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred"); *see also General Motors Corp. v. Washington*, 377 U.S. 436, 440-41 (1964) (nexus exists if "the State is exacting a constitutionally fair demand for that aspect of interstate commerce to which it bears a special relation," judged by looking at whether there is a fair proportion between "business activities" in the State and the "opportunities

and protections which the State has afforded"), *overruled in part by Tyler Pipe*, 483 U.S. at 248.[6]

A functional approach that tests whether a corporation has purposefully "avail[ed] itself of the substantial privilege of carrying on business within the State" (*Mobil Oil*) or has undertaken activities "significantly associated with the taxpayer's ability to establish and maintain a market in this state for sales" (*Tyler Pipe*) is tailored exactly to the core due process concern—that a party should be within the power of a State only if it has sought out and benefitted from state opportunities and protections. *See, e.g., J.C. Penney*, 311 U.S. at 444.

The functional standard ensures, first, that a seller has clearly and deliberately directed its attention towards a state market by regular and continuous solicitation or other means; no seller will incur collection responsibilities it has not anticipated and had the chance to avoid. The North Dakota statute meets this requirement by imposing the use tax collection duty only on sellers engaging in "regular or systematic solicitation of sales" by a variety of means. N.D. Cent. Code § 57-40.2-01(7) (Supp. 1991).[7]

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[6] Justice Rutledge's concurrence in *General Trading Co. v. State Tax Comm'n*, 322 U.S. at 354, most directly states the functional inquiry:

> for every relevant constitutional consideration affecting taxation of transactions, regular, continuous, persistent solicitation has the same economic, and should have the same legal, consequences as does maintaining an office for solicitation . . . or maintaining a place of business. . . .

See also Paul J. Hartman, *Federal Limitations on State and Local Taxation* § 2:7 at 32 (1981 & Supp. 1990) (noting Court's emphasis on "the importance of local market-producing and supporting activities" conducted by the taxpayer when defining nexus in gross receipts cases).

[7] The use tax collection statutes of other States include similar requirements. *See* National Conference of State Legislatures, *et al.* Br. *Am. Cur.* on Pet. 7-8 & nn. 6-7. "Regular or systematic solicitation of sales" for the purposes of N.D. Cent. Code § 57-40.2-01(7)

A functional approach grounded on whether a seller has in fact established and maintained an in-state market also ensures that nexus will not exist if a seller has not enjoyed the opportunities, benefits, and protections afforded by a State through successfully exploiting its market. North Dakota's statute meets this requirement as well. Because the statute imposes solely a *collection* duty on sellers, no obligation comes into play unless sales have taken place. Those sales are made possible only by the market facilities and protections richly described by the State, including roads, telephone service, and a court system enforcing consumer protection and contract laws. *See* Resp. Br. 33-35; *see also General Trading*, 322 U.S. at 353-54 (Rutledge, J., concurring).

Tax collection duties have repeatedly been approved by this Court.[8] Like those, the collection duty here is constitutional because it is imposed on a company deliberately establishing and maintaining a market in the State.

2. *The Anachronism of the Physical Presence Requirement*

The assertion by Quill and its *amici* that nexus can exist only if a seller is physically present within North Dakota "states a rule without disclosing the reasons for it." *Mobil Oil*, 445 U.S. at 445 (rejecting single situs rule where fiction of corporate presence in one location lacked rationale).

In the days when sales were largely consummated in person, physical presence might well have been one rea-

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is defined to require "three or more separate transmittances of any advertisement or advertisements" during a 12-month period. N.D. Admin. Code § 81-04.1-01-03.1(3) (1991).

[8] *Monamotor Oil Co. v. Johnson*, 292 U.S. 86, 93-94 (1934); *Nelson v. Sears*, 312 U.S. at 365-66; *Nelson v. Montgomery Ward & Co.*, 312 U.S. 373, 375 (1941); *General Trading*, 322 U.S. at 338; *Scripto*, 362 U.S. at 212; *National Geographic Soc'y v. California Bd. of Equalization*, 430 U.S. 551, 556 (1977).

sonable indicator of business activity. Accordingly, this Court's pre-*Bellas Hess* cases generally considered whether a party was physically present in a jurisdiction seeking control over it. Yet while physical presence was *relevant* in considering whether a State had jurisdiction to tax, it was never *dispositive* of that inquiry. *See* cases cited pp. 8-9, *supra*.[9] Indeed, in the only other case to invalidate the duty to collect a use tax, *Miller Bros. Co. v. Maryland*, 347 U.S. 340 (1954), the Court declined to elevate physical presence in the form of regular deliveries as sufficient to found jurisdiction. *See id.* at 342. Rather, the Court extracted as the essence of its earlier cases the operational notion that due process requires "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." *Id.* at 344-45.[10]

Today physical presence is no longer a *sine qua non*, even in a rough sense, for the conclusion that a seller has

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[9] *See also Northwestern States Portland Cement*, 358 U.S. at 465 (noting that corporations engaged in "substantial income-producing activity" and ran "vigorous and continuous sales campaigns" by virtue of an in-state presence); *Scripto*, 362 U.S. at 212 (listing fact that no solicitors operated in State as only one factor in distinguishing *Miller Bros. Co. v. Maryland*, 347 U.S. 340 (1954)); *Nelson v. Sears*, 312 U.S. at 364 (mail order business taxable as part of total state business despite fact that in-state agents not involved in mail order). *Compare General Trading*, 322 U.S. at 338 (degrees of physical presence dismissed as "without constitutional significance") *and id.* at 356 (Rutledge, J., concurring) (substantial contact by seller's or buyer's States may be *either* in sense of territorial sovereignty or in terms of benefits conferred) *with id.* at 339 (Jackson, J., dissenting) (objecting that no jurisdiction exists because no significant physical presence). *See generally* Donald P. Simet, *The Concept of "Nexus" and State Use and Unapportioned Gross Receipts Taxes*, 73 Nw. U. L. Rev. 112, 114-116 (1978).

[10] Consequently, in its efforts to distinguish its *General Trading* precedent from the situation in *Miller Brothers*, the Court relied on the *functions* rather than the *physical presence* of those in the State, characterizing the efforts of traveling salesmen in *General Trading* as an "active and aggressive operation" while denying that the deliveries in *Miller Brothers* constituted an "invasion or exploitation" of the market in Maryland. 347 U.S. at 347.

deliberately targeted a state market. As the Court noted in a related context, "it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985); *see also International Shoe*, 326 U.S. at 316-17 (noting that term " 'presence' " is used "merely to symbolize" activities in a State that courts "will deem to be sufficient to satisfy the demands of due process").

The specter of the dysfunctionality of physical presence as an indicator of business activity loomed large even in 1967. *See Bellas Hess*, 386 U.S. at 760-66 (Fortas, J., dissenting). In the pre-*Complete Auto* era, however, physical presence played an additional role. The Court had in that period developed a doctrine of "local activity" which it used to mitigate the sweeping immunity of interstate commerce from taxation: certain aspects of apparently interstate activity were identified as "local" in fact and therefore as taxable. *See generally*, Hartman, *supra*, § 2:18. Physical presence could be used as evidence that activity was in fact local. *See, e.g., Scripto*, 362 U.S. at 211-12 (approving use tax on ground that while "no State can tax the privilege of doing interstate business," salesmen performed the "local function" of solicitation); *Nelson v. Sears*, 312 U.S. at 371 (Roberts, J., dissenting) (denying validity of use tax because "there is, in the conduct of respondent's mail order business, no such local activity"); *cf. Bellas Hess*, 386 U.S. at 759 (since there was "neither local advertising nor local household deliveries," mail order transactions were "exclusively interstate in character").

Institutionalized by the *Bellas Hess* Court to play a largely formalistic role, the physical presence requirement lost that remaining rationale when *Complete Auto* rejected the "interstate immunity" theory and thus obviated

the need to use physical presence as an indicator of "local activity." Accordingly, the Court soon loosened the tie between jurisdiction to tax and the fact of physical presence. Thus in *National Geographic Soc'y v. California Bd. of Equalization*, 430 U.S. 551 (1977), the Court removed the requirement of a transactional relationship linking the purpose of a seller's physical presence in a State to the existence of taxing jurisdiction over another activity of the seller.[11] 430 U.S. at 560-62; *see also id.* 562-63 (Blackmun, J., concurring) (highlighting difficulty in reconciling Court's reliance on attenuated physical presence in *National Geographic* with its rejection of more related physical presence in *Miller*). In *D.H. Holmes Co. v. McNamara*, 108 S. Ct. 1619, 1624 (1988), involving a use tax on catalogues distributed by a retailer who also ran 13 in-state department stores, the Court elaborated on the retailer's significant in-state "economic presence" and the role of its catalogues in "expanding and enhancing its Louisiana business," points irrelevant if simple physical presence should have ended the jurisdictional inquiry.[12]

The retention of the physical presence requirement now would be pure formalism, anomalous after the fall of the "interstate immunity" view and in an age of interactive faxes. The absurdities of attributing talismanic significance to the physical presence factor have been developed

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[11] Because the seller in *National Geographic* operated two offices in the market State, the Court did not need further to probe the continuing validity of physical presence as a ground of jurisdiction. *Id.* at 560 n.6. Contrary to Quill's argument (Pet. Br. 27-29), the Court's rejection of a "slightest presence" standard, *id.* at 556, is less an affirmation of the *Bellas Hess* rule than a refusal to adopt a standard not necessary on the facts presented.

[12] Likewise, in *Standard Pressed Steel Co. v. Washington Dep't of Revenue*, 419 U.S. 560, 562 (1975), a pre-*Complete Auto* case, the Court stressed the importance of the function played by a seller's single in-state employee by noting that the employee "made possible the realization and continuance of valuable contractual relations" between the seller and its client.

in other briefs. Resp. Br. 25-28; International Council of Shopping Centers, *et al.*, Br. *Am. Cur.* 12-15. The greatest anomaly of all is that the States' development of sophisticated markets that facilitate interstate business ultimately undermines their community, since the States' loss of revenue increases in direct relation to the development of sophisticated marketing technology.[13] In such circumstances, the concept of physical presence "should not be solidified into a constitutional barrier" against a fair state statute. *Travelers Health Ass'n v. Virginia*, 339 U.S. 643, 649 (1950).

3. *Doctrinal Evolution toward Functional Standards*

"The history of the Commerce Clause is," as described by Justice Frankfurter, "the history of judicial evolution." *Northwestern States Portland Cement*, 358 U.S. at 473 (Frankfurter, J., dissenting). Given the Court's long-standing commitment "to accommodate the necessary abstractions of tax theory to the realities of the marketplace," *Trinova Corp.*, 111 S. Ct. at 829, the Court has regularly abandoned archaic physical or "[m]etaphysical" formulae in favor of functional criteria. *Travelers Health Ass'n*, 339 U.S. at 648. *Complete Auto's* rejection of the conclusory distinction between nontaxable interstate commerce and taxable local activity is only illustrative of this type of advance. The Court has thus, for example, updated and rationalized Commerce Clause doctrines concerning the extent of State power by rejecting such fictions as the "original package" doctrine (*Sonneborn Bros. v. Cureton*, 262 U.S. 506 (1923)); the "home

[13] According to the most recent figures published by the Advisory Commission on Intergovernmental Relations, the revenue loss to States from untaxed interstate direct marketing sales was $2.91 billion in 1990, and is projected to be $3.08 billion in 1991, and $3.27 billion in 1992. For the average sales tax State, the 1990 loss of revenue from use tax was $63.2 million. *See* Advisory Comm'n on Intergovernmental Relations, *State Taxation of Interstate Mail-Order Sales: Revised Revenue Estimates, 1990-1992* 2 (1991).

port" doctrine (*Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169 (1949)); the distinction between "direct" and "indirect" burdens on interstate commerce (*Department of Rev. v. Association of Washington Stevedoring Cos.*, 435 U.S. 734, 750 (1978)); and the doctrine of state "ownership" of wild animals (*Hughes v. Oklahoma*, 441 U.S. 322 (1979)). *See generally* Hartman, *supra*, §§ 2:13-2:18, 2:25.

Evolution towards a functional standard is especially appropriate here since that movement would parallel the development of the doctrine of *in personam* jurisdiction.[14] As more completely developed by other *amici* (*see* International Council of Shopping Centers, *et al.*, Br. *Am. Cur.* 21-23), the contemporary due process limitations on both taxing and adjudicatory jurisdictions had their genesis in the same reasoning. After concluding that "systematic and continuous" business activities that brought a corporation "the benefits and protection" of a State sufficed to constitute "presence" in the State, the *International Shoe* Court held that "[t]he activities which establish [a corporation's] 'presence' subject it alike to taxation by the state and to suit to recover the tax." 326 U.S. at 319-21.

This Court long ago dismissed as obsolete the contention that a State could not exercise *in personam* jurisdiction over a defendant not physically present in the State. *See McGee v. International Life Ins. Co.*, 355 U.S. 220, 222-223 (1957). It stands to reason that the "nexus" requirement of the Commerce Clause, an explicit incorporation of due process limitations on state

[14] That process is marked, as in the case of Commerce Clause jurisprudence, by the progressive replacement of artificial, formal, or physical distinctions by more functional criteria. *See, e.g., St. Clair v. Cox*, 106 U.S. 350 (1882) (rejecting fiction that corporation is physically present only in State of incorporation); *International Shoe*, 326 U.S. at 316 (noting historical ties of *in personam* jurisdiction to physical presence in a State). *See generally* Sandra B. McCray, *Overturning* Bellas Hess: *Due Process Considerations*, 1985 B.Y.U. L. Rev. 265, 271-74.

jurisdiction (*see* p. 7, *supra*), should have the same scope. Territorial boundaries should not be raised as a shield by businesses to avoid either tax or adjudicatory obligations incurred in a State once freedom of access to the State has been commercially exploited. *See Burger King*, 471 U.S. at 474.

4. *Nexus for Tax Collection Duties*

As a matter of logic, law, and doctrinal coherence, any nexus sufficient to ground jurisdiction to *tax* is sufficient, *a fortiori*, to ground jurisdiction to impose a duty to *collect* taxes. Logically, the burden to collect taxes is, of course, less oppressive than the burden to pay them, and includes no risk of double taxation. *See, e.g., Scripto*, 362 U.S. at 211; *National Geographic*, 430 U.S. at 558. It is within the control of the seller to avoid losses by conditioning transfer of the merchandise on collection of the tax.[15] *See, e.g., National Geographic*, 430 U.S. at 558. In this case, moreover, the State reimburses sellers for a portion of their administrative costs. *See* N.D. Cent. Code § 57-40.2-07.1 (Supp. 1991).

National Geographic confirmed that imposition of a duty to collect taxes, as opposed to imposition of a direct tax, *decreases* the need for a restrictive concept of nexus. *See* 430 U.S. at 558; *id.* at 560 (reserving question whether the same amount of contact would suffice for direct tax). Nor do the administrative costs of complying with a valid collection requirement somehow affect the question whether nexus exists: the Court has already and expressly rejected that contention. *See Scripto*, 362 U.S.

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[15] As the Court put it in *Nelson v. Sears*, 312 U.S. at 366:

> [A seller] is in no position to found a constitutional right on the practical opportunities for tax avoidance which its method of doing business affords [state] residents, or to claim a constitutional immunity because it may elect to deliver the goods before the tax is paid.

at 211, 212-13; *Nelson v. Sears*, 312 U.S. at 365-66; *Nelson v. Montgomery Ward*, 312 U.S. at 375; *cf. National Geographic*, 430 U.S. at 558.[16]

The conclusion that collection duties do not necessitate a restrictive concept of nexus accords with the state of the doctrine in closely related fields. Whereas the presence of property in a State, without more, is insufficient to found jurisdiction over a suit on an unrelated cause of action, *see, e.g., Shaffer v. Heitner*, 433 U.S. 186 (1977), the Court has already held in *National Geographic* that there is no such transactional requirement in order for a State to impose a tax collection requirement when a seller has property in a State. The nexus requirement underlying the imposition of collection duties cannot therefore be *stricter* than those underlying adjudicatory jurisdiction.

Conversely, where lesser nexus requirements clearly prevail, the Court has abandoned as dysfunctional the physical presence test. *See Travelers Health Ass'n*, 339 U.S. at 647 (rejecting need for physical presence where "business activities reach out beyond one state and create continuing relationships and obligations with citizens of another state"); *see also id.* at 648.[17]

In short, there is no reason to disturb the conclusion reached by the State in this case that nexus exists be-

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[16] In fact, the sellers in both *Nelson* cases submitted calculations demonstrating effects at least as onerous as those claimed here. Sears claimed that compliance costs and losses for which it was liable to the State would total $45,700 for every $100,000 of use tax due (or $5,000,000 in sales). *Nelson v. Sears*, 312 U.S. at 365 n.4; *see also id.* at 367-68 (Roberts, J., dissenting). Montgomery Ward likewise asserted a total $2,490 cost plus loss liability for every $10,000 in tax due. *Nelson v. Montgomery Ward*, 312 U.S. at 375 n.5. The Court rejected these arguments as irrelevant to the constitutional issue.

[17] Although *Travelers Health Association* was decided before *Bellas Hess*, the "interstate immunity" theory did not color its conclusions, since Congress has exempted the insurance industry from Commerce Clause protections. *See* 15 U.S.C. §§ 1011-15 (1988).

cause Quill by regular and systematic solicitation has purposefully availed itself of the privileges, opportunities, and benefits offered by North Dakota. It cannot be said that the State's statute reaches improperly outside the State's borders to take property without "due process of law."

B. The State Has Imposed Its Collection Duty Only on Its Fair Share of the Interstate Activity

"[T]he central purpose behind the apportionment requirement is to ensure that each State taxes only its fair share of an interstate transaction." *Goldberg*, 109 S. Ct. at 588. The requirement thus prohibits the imposition of taxes capable of repetition, either because more than one State could tax the same transaction or because a State taxes a portion of interstate commerce larger than its in-state component. *See id.* at 589.

Use taxes and the corresponding collection duties carry no risk of double taxation. *See Henneford v. Silas Mason Co.*, 300 U.S. 577, 583-85 (1937); *National Georgraphic*, 430 U.S. at 558. Applying this Court's "internal" and "external" consistency tests simply confirms the fair reach of the statute in this case. First, the use tax imposed here is "internally consistent" because "if every State were to impose an identical tax, no multiple taxation would result." *See Goldberg*, 109 S. Ct. at 589. No one else can tax the same transaction because the State provides a credit against its use tax if a sales tax has been paid in another State. N.D. Cent. Code § 57-40.2-11 (1983); *see, e.g., D.H. Holmes*, 108 S. Ct. at 1623-24. The same is true, *a fortiori*, as far as the collection duty is concerned, since the seller need not bear the burden of the tax. *National Geographic*, 430 U.S. at 558.

Second, the use tax here is "externally consistent" because "the State has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed." *Goldberg*, 109 S. Ct. at 589. A use tax reasonably reflects the in-state component of interstate activity because, like the sales tax for which it compensates and in proportion to future use, it is "assessed on the individual consumer, collected by the retailer, and accompanies [a] retail purchase." *Id.* The same logic validates the administrative requirements of the collection duty.

C. The Collection Duty Imposed By the State Does Not Discriminate Against Interstate Commerce

The primary inquiry under the discrimination prong of the *Complete Auto* test is whether a statute is "discriminatory on its face." *See Trinova*, 111 S. Ct. at 835. The Court has also considered, independently or as part of this inquiry, whether a statute has a discriminatory intent or effect. *Id.; see also Amerada Hess*, 109 S. Ct. at 1622-23. This Court has most recently clarified that, insofar as the Commerce Clause requires more than "mere facial neutrality[,] [t]he content of that requirement is fair apportionment." *Trinova*, 111 S. Ct. at 835. The discussion above demonstrates that the statute here satisfies the latter requirement.

It is well-settled that neither use taxes nor the obligation to collect them discriminates facially or in any other way against interstate commerce. The use tax imposed by North Dakota is equal to a corollary sales tax on property purchased in-state, and a credit is given in the amount of the use tax if another sales tax has been paid. *See* N.D. Cent. Code §§ 57-39.2-02.1; 57-40.2-02.1 (Supp. 1991); 57-40.2-11 (1983). As the design of the statute indicates, the purpose of the use tax is wholly benign: it is intended "to compensate the state for revenue lost when residents purchase out-of-state goods for use within the State." *D.H. Holmes*, 108 S. Ct. at 1624; *Henneford*, 300 U.S. at 583-85; *Maryland v. Louisiana*, 451 U.S. 725, 758-59 (1981). Thus, "the use tax and the sales tax are complementary. Sales made wholly within [the State]

carry the same burden as these mail order sales." *Nelson v. Sears*, 312 U.S. at 364. The same equality characterizes the obligations imposed on those collecting the use tax relative to those collecting the sales tax. Nor is there any claim that the State has otherwise introduced any illegitimate bias into either the use tax or its collection. *Cf. Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963).

The nondiscriminatory nature of the collection duty is made especially clear by analyzing the actual operation of that duty. Because North Dakota imposes both a sales and a use tax, every seller within the State's taxing jurisdiction must calculate, collect, and remit a tax—either "sales" or "use"—on each sale to a North Dakota resident. A seller would gain no advantage, as far as easing its administrative requirements on the sale at issue, by relocating to North Dakota. Thus the measure here fully satisfies the Commerce Clause because it "maintain[s] state boundaries as a neutral factor in economic decisionmaking." *American Trucking Ass'n, Inc. v. Scheiner*, 483 U.S. 266, 283 (1987); *see also Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 329-33 (1977); *id.* at 335-36 (striking down scheme that diverted interstate commerce into State despite economic efficiencies of locating business elsewhere).[18] It is this discrimination—not simply the higher costs that attach *in the aggregate* to doing interstate business—that the Commerce Clause prohibits.

[18] The duty here is therefore unlike the tax imposed in *Scheiner*, a flat axle tax that "exert[ed] an inexorable hydraulic pressure on interstate businesses to ply their trade within the State that enacted the measure rather than 'among the several States.'" 483 U.S. at 286-87. Here the collection duty is the same whether one is located in or out of State, it attaches proportionately to each sale, and the tax itself correlates with state sales taxes. Thus the seller gains nothing by locating in North Dakota or by selling a higher as opposed to lower volume there, either to escape or reduce administrative requirements, or to offer goods that are competitively priced.

D. The Collection Duty Imposed Here Is Reasonably Related to the Activities of the Seller in the State

The fourth prong of the *Complete Auto* test embodies the due process requirement that a tax be "fairly related to the services provided by the State." 430 U.S. at 279. That is, there must be "'a rational relationship between the income attributed to the State and the intrastate values of the enterprise.'" *Trinova*, 111 S. Ct. at 828 (citation omitted).

As this Court has made abundantly clear, this prong does not require that a tax be limited by or even "reasonably related to" the *value* of the services provided the taxpayer by the State. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 621-27 (1981); *Goldberg*, 109 S. Ct. at 591-92. Taxes are assessed on the theory that government provides for "the common good"; the States may therefore require taxpayers to contribute to the general cost of government. *Commonwealth Edison*, 453 U.S. at 622-23. The fourth prong is satisfied when "the *measure* of the tax [is] reasonably related to the extent of the contact." *Id.* at 626.

That requirement is easily met by the statute in this case. By definition, the collection duty here "is assessed in proportion to [the] taxpayer's activities," *Commonwealth Edison*, 453 U.S. at 627, in North Dakota because it is tied to the number of sales made there.

II. THE ADMINISTRATIVE REQUIREMENTS OF COLLECTING USE TAX ARE PART OF THE COSTS OF CONDUCTING A MULTISTATE BUSINESS

Quill and its *amici* have relied heavily on the argument that the administrative costs connected with collecting use tax somehow convert that otherwise valid measure into an unconstitutional burden on interstate commerce. Federal constitutional law does not, however, immunize

multistate businesses from the costs of complying with state tax obligations. Nor can this Court be asked to police the level of such costs. In any case, the costs of compliance are far lower in fact than Quill and its *amici* claim.

A. The Commerce Clause Does Not Place a Ceiling on the Administrative Costs That a Multistate Business May Incur in Complying with Valid State Tax Obligations

1. The constitutional commitment represented by the Commerce Clause is that all parties will have fair and nondiscriminatory access to a multistate market. *See Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522-23 (1935). The Clause therefore operates "'to ensure that each State taxes only its fair share of an interstate transaction.'" *Trinova*, 111 S. Ct. at 836 (quoting *Goldberg*, 488 U.S. at 260-61). The Constitution prohibits "state taxes which . . . either give rise to serious concerns of double taxation, or attempt to capture tax revenues that, under the theory of the tax, belong of right to other jurisdictions." *Id.*

It in no way follows that "the bare fact that one is carrying on interstate commerce ... [relieves] him from the many forms of state taxation which add to the cost of his business." *Western Live Stock*, 303 U.S. at 254. Rather, within the scope of its authority and by fair means of taxation, a State "is free to pursue its own fiscal policies." *J.C. Penney*, 311 U.S. at 444. Nor will the Commerce Clause dictate or protect "the particular structures" or "methods of operation" in a retail market. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127 (1978). That constitutional guarantee guards only "the interstate market, not particular interstate firms, from prohibitive or burdensome regulations." *Id.* at 127-28.[19]

[19] Thus if administrative costs raise the barriers to entry to the direct market now so low, *see* Direct Marketing Ass'n Br. *Am. Cur.*

Quill's objection to the administrative costs of collecting use tax is premised on a contrary theory. Despite the fact that the State here imposes a reasonable duty on an actor that has sought out and exploited the benefits of an in-state market; that the State is not taxing activities that will be taxed by others; and that the State is not discriminating in favor of local businesses, Quill finds an unconstitutional result in its compliance costs per se. That is, Quill is objecting to the costs inherent in engaging in business in a federated society in which no unit is abusing its power.

The argument resurrects the "interstate immunity" theory; it fails the *Complete Auto* test precisely because that test is designed to reject it. It is a basic premise of the contemporary marketplace that businesses should expand nationally only insofar as they can afford the costs—including the tax burdens—of doing multistate business. *See, e.g., Washington Stevedoring*, 435 U.S. at 748. Indeed, the responsibility for collecting use tax pales in comparison to tax obligations routinely borne by in-state retailers as an inherent cost of doing business, including state and local property taxes, business taxes, income taxes, gross receipts taxes, and collection duties on sales taxes.

Conversely, if Quill's administrative costs exonerate it as a matter of constitutional law from collecting use tax

15, or cause some smaller interstate businesses to be replaced by larger ones, the problem is an economic, not a constitutional, one. *See Exxon*, 437 U.S. at 126-28. If these results are unpalatable, other governmental bodies properly make the policy or protectionist decisions:

> Under our federal system, the determination [as to the appropriate level of state taxes] is to be made by state legislatures in the first instance and, if necessary, by Congress, when particular state taxes are thought to be contrary to federal interests.

Commonwealth Edison, 453 U.S. at 628.

on these sales, it need collect no tax at all on them.[20] The irony of the argument is obvious—by *exploiting multiple* state markets, a direct marketer avoids the obligation to contribute to *any* of them. That result is incompatible with this Court's recognition that where parties " 'purposefully derive benefits' " from interstate activities, they cannot escape the obligations that may attach. *Burger King*, 471 U.S. at 473-74 (quoting *Kulko v. California Superior Court*, 436 U.S. 84, 96 (1978)); *see Commonwealth Edison*, 453 U.S. at 620 n.9.[21]

2. In fact, even in the era of "interstate immunity," the Court had developed exceptions under which it had already rejected the "administrative costs" argument made here. As described above, the Court attempted to ensure that interstate commerce "pa[id] its own way" at least some of the time by distinguishing between activities that were essentially local and those that were purely interstate commerce. *See, e.g., Henneford*, 300 U.S. at 582 (use tax applies "after commerce is at an end"); *Western Live Stock*, *supra*; *see also* cases cited at p. 12, *supra*. Consistently with this method, the Court explicitly rejected the "administrative costs" argument developed by the retailers in *Nelson v. Sears*, 312 U.S. at 365-66, and *Nelson v. Montgomery Ward*, 312 U.S. at 375. *See* note 16, *supra*.[22]

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[20] North Dakota could not impose sales tax on the sales, *McLeod v. Dilworth Co.*, 322 U.S. 327 (1944), nor apparently could Illinois reach the transaction, *see Eveo v. Jones*, 409 U.S. 91, 93-94 (1972); *J.D. Adams Mfg. Co. v. Storen*, 304 U.S. 307 (1938) (both involving gross receipts taxes). Under Pub. L. 86-272, 15 U.S.C. § 381 (1988), neither would direct marketers be liable for net income tax apportioned to market state activity.

[21] The Court has, in fact, similarly rejected the argument in closely related contexts that administrative inconvenience amounted to a due process violation. *See McGee*, 355 U.S. at 224; *Travelers Health Ass'n*, *supra*.

[22] The principal support for Quill's position occurs only in dissent and on the now obsolete ground that "exclusively interstate commerce" should not be taxed. *See Northwestern States Portland*

As these cases indicate, even in the pre-*Complete Auto* era, the Court had developed a method "crucial for protecting States' taxing power." *Commonwealth Edison*, 453 U.S. at 615. Since the business activity upon which the collection duty here is premised would qualify as a "local activity" (assuming a functional nexus standard), Quill must have this Court resurrect its "interstate immunity" doctrine in its most formalistic avatar, stripped even of the "local activity" qualification, in order to prevail.

B. The Court Cannot Properly Police the Administrative Costs of Complying with Nondiscriminatory and Fairly Apportioned Taxes by Using Federal Constitutional Law

"In essence," Quill "ask[s] this Court to prescribe a test for the validity of state taxes that would require state and federal courts, as a matter of federal constitutional law, to calculate" acceptable levels of administrative costs that can attach to "activities that are conceded to be legitimate subjects of taxation." *Commonwealth Edison*, 453 U.S. at 628. This Court has already refused to calculate "acceptable rates or levels of taxation." *Id.* *A fortiori* and for the same reasons it should refuse constitutionally to calibrate administrative costs.

1. *Legislative Nature of the Determination*

First, goals of "economy in administration" for taxpayers, as much as for States, are "questions of fiscal policy" that cannot be answered by the Court. *Henneford*, 300 U.S. at 588; *see, e.g., Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 279-80 (1978) (determining best method of taxation is legislative "policy decision" inappropriate for Court); *Trinova*, 111 S. Ct. at 836 (same); *Common-*

Cement, 358 U.S. at 474 (Frankfurter, J., dissenting); *see also Nelson v. Sears*, 312 U.S. at 367-71 (Roberts, J., dissenting) (objecting to imposition of collection costs on same grounds).

wealth Edison, 453 U.S. at 628 (same); *see also* Hartman, *supra*, § 2:27 at 163-64 (Supp. 1990).[23] The arguments made by Quill and its *amici*, including the arguments that the direct marketing industry must be protected and that other methods of taxation are available to the States, make this point clear. One need only imagine, to drive the point home, the kind of determinations the Court would need to make as it proceeded—for instance, what kind of flat, unified tax rates would adequately minimize administrative requirements, or whether and what type of recoupment provisions made by States would be sufficient to reimburse collection costs and therefore remove the constitutional burden.[24]

Second, such supervision would involve extremely complicated factual investigations. *See Commonwealth Edison*, 453 U.S. at 628. Here, for example, much material not properly in the record has been introduced, *see, e.g.*, Direct Marketing Ass'n Br. *Am. Cur.* App., and extrapolations have been made from self-serving congressional

[23] As the Court put it in *J.C. Penney*, 311 U.S. at 445:

> At best, the responsibility for devising just and productive sources of revenue challenges the wit of legislators. Nothing can be less helpful than for courts to go beyond the extremely limited restrictions that the Constitution places upon the states and to inject themselves in a merely negative way into the delicate processes of fiscal policy-making.

[24] This approach would assume, conversely, that legislatures are insensitive to the reasonable requirements of an important commercial industry. This Court has properly declined to "second-guess" legislative decisions of this kind. *See Commonwealth Edison*, 453 U.S. at 427 n.16; *Moorman Mfg.*, 437 U.S. at 279-80. The common existence of recoupment provisions like that of North Dakota's (N.D. Cent. Code § 57-40.2-07.1 (Supp. 1991)) corroborates the Court's judgment. *See, e.g.*, Fla. Stat. § 212.12(1) (Supp. 1990); Ga. Code Ann. § 48-8-50 (Michie 1982); Ky. Rev. Stat. § 139.570 (Michie/Bobbs-Merrill Supp. 1991); Mo. Ann. Stat. § 144.140 (Vernon 1976); Tex. Tax Code Ann. §§ 151.423-151.424 (Vernon Supp. 1991).

testimony without cross-cutting evidence being presented, *see, e.g., id.* Br. 20. Under these conditions, the courts cannot conduct a thorough review of the actual extent of the administrative costs claimed.

For these reasons, this Court has repeatedly declined the role offered here by Quill and its *amici*, even at the expense of tolerating some risk of duplicative taxation. *See, e.g., Trinova*, 111 S. Ct. at 829 (accepting geographically imprecise apportionment formula given State's decision that other methods of calculation raised serious theoretical and practical difficulty); *Goldberg*, 109 S. Ct. at 590 (approving state system of taxing telephone calls despite some risk of multiple taxation); *Commonwealth Edison*, 453 U.S. at 627-29 (declining to set severance tax levels); *Moorman Mfg.*, 437 U.S. at 279-80 (declining to establish uniform rules for division of income despite risk of multiple taxation). There is no such risk here; *a fortiori*, the Court should confirm that "[u]nder our federal system," such determinations are "to be made by state legislatures in the first instance and, if necessary, by Congress." *Commonwealth Edison*, 453 U.S. at 628; *see id.* at 637-38 (White, J., concurring).[25]

2. *Propriety of Action by the Court*

The argument that the "extremely limited restrictions" placed on the States by the Commerce Clause, *J.C. Penney*, 311 U.S. at 445, include the need for the Court to police the character and weight of administrative costs should be rejected in this case for both prudential and jurisprudential reasons.

In every tax case and so long as we have a federal system, the obligations incurred by a business operating in many States are in some degree burdensome. *See,*

[25] The fact that bills have repeatedly been introduced in Congress to correct *Bellas Hess* legislatively only *confirms* that the problem has not escaped legislative attention. *See Commonwealth Edison*, 453 U.S. at 628 n.18.

e.g., *Moorman*, 437 U.S. at 278-79 (detailing complexities of apportionment formulas); Albert H. Cohen, *State Tax Allocations and Formulas Which Affect Management Operating Decisions*, 1 J. Taxation 2 (1954). The same argument that Quill makes here—that its compliance costs "burden" interstate business—could be raised in any one of a thousand cases.[26]

Only the Court can lay the argument to rest. As reviewed above, it rests on a notion of interstate commerce that has been decisively rejected by this Court in *Complete Auto* and its progeny. That is, the "primary alteration" in Commerce Clause jurisprudence has already taken place. *Washington Stevedoring*, 435 U.S. at 749.

The reason that the Court should take action, however, rests on grander doctrinal grounds as well. As the Court put it in *Washington Stevedoring*, 435 U.S. at 749:

> The Commerce Clause does not state a prohibition; it merely grants specific power to Congress. The prohibitive effect of the Clause on state legislation results from the Supremacy Clause and the decisions of this Court.

Insofar as the *Bellas Hess* decision rested on due process grounds, it is thus not clear that it could be altered by the congressional action Quill and its *amici* propose. In any case, the Commerce Clause justifies only those "prohibitive effects" necessary to guard the functioning of the federal system. Invalidation of North Dakota's fair and reasonable statute is not one of them.

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[26] Quill, like any in-state corporation, could object to the duties imposed on it as so confiscatory as to constitute a taking. *Commonwealth Edison*, 453 U.S. at 627 n.17. It cannot, however, conflate that argument with its interstate character as if that places it in a "privileged position." *Id.* at 628.

C. The Costs of Collecting Use Tax Are Not Burdensome In Fact

1. Quill and its *amici*'s empirical argument about the costly nature of collecting use tax mistakes at the outset the very facts of this case. The North Dakota Supreme Court in this case held N.D. Cent. Code § 57-40.2-01(7) (Supp. 1991) constitutional as applied to Quill, thus placing at issue *only* a state tax. According to this holding, Quill needs to calculate and apply one use tax rate and file one return to comply with its state use tax obligation. There is no constitutionally significant complexity to fulfilling this obligation for every State, territory, and the District of Columbia.

Further, the State in this case reimburses Quill for its administrative costs in collecting use tax. *See* N.D. Cent. Code § 57-40.2-07.1 (Supp. 1991). There is no showing by Quill, a large direct marketer, that this amount is insufficient to reimburse it for its costs.

2. Even assuming this case placed at issue the obligation of sellers to collect local as well as state use taxes, Quill and its *amici* have greatly exaggerated the administrative difficulties that face a direct marketer.

The State has detailed the computerized systems, available at low costs and for use on personal computers, that make routine calculating and complying with varied state and local tax obligations. Resp. Br. 39-42. In addition, businesses can subscribe to services that supply manuals detailing the state and local tax rates nationwide. *Id.* at 43. The State also details the extent to which Quill and its *amici* have overstated the complexity of the multistate tax system itself. *Id.* at 43-44. It is, in sum, a manageable administrative task to comply with the tax laws of each State in which a direct marketer does business.

CONCLUSION

The judgment of the Supreme Court of North Dakota should be affirmed.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1991

QUILL CORPORATION,

Petitioner,

v.

STATE OF NORTH DAKOTA, BY AND THROUGH ITS TAX COMMISSIONER, HEIDI HEITKAMP,

Respondent.

On Writ Of Certiorari To The Supreme Court Of North Dakota

BRIEF OF THE STATES OF CONNECTICUT, TENNESSEE, CALIFORNIA, ARKANSAS, FLORIDA, GEORGIA, IDAHO, ILLINOIS, IOWA, KENTUCKY, LOUISIANA, MARYLAND, MASSACHUSETTS, MICHIGAN, MISSISSIPPI, NEVADA, NEW YORK, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, TEXAS, UTAH, VERMONT, VIRGINIA, WASHINGTON, WEST VIRGINIA AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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No. 91-194

In The

Supreme Court of the United States

October Term, 1991

QUILL CORPORATION,

Petitioner,

v.

STATE OF NORTH DAKOTA, BY AND THROUGH ITS TAX COMMISSIONER, HEIDI HEITKAMP,

Respondent.

On Writ Of Certiorari To The Supreme Court Of North Dakota

BRIEF OF THE STATES OF CONNECTICUT, TENNESSEE, CALIFORNIA, ARKANSAS, FLORIDA, GEORGIA, IDAHO, ILLINOIS, IOWA, KENTUCKY, LOUISIANA, MARYLAND, MASSACHUSETTS, MICHIGAN, MISSISSIPPI, NEVADA, NEW YORK, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, TEXAS, UTAH, VERMONT, VIRGINIA, WASHINGTON, WEST VIRGINIA AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF THE AMICI

Connecticut, Tennessee, California and the other named states submit this brief as *amici curiae* in support of respondent North Dakota, and urge this Court to affirm the ruling of the Supreme Court of North Dakota in *North Dakota v. Quill Corporation*, 490 N.W.2d 203 (N.D.

1991). Since this brief is being filed on behalf of Connecticut, Tennessee, California, Arkansas, District of Columbia, Florida, Georgia, Idaho, Illinois, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Nevada, New York, Ohio, Oklahoma, Pennsylvania, South Carolina, Texas, Utah, Vermont, Virginia, Washington, and West Virginia by their Attorneys General, consent to its filing is not required. U.S. Sup. Ct. R. 37.5.

The issue presented by this case is whether a state can constitutionally require multistate direct marketers that regularly and systematically exploit the state's market to collect the state's use tax. This issue is of vital importance to all 46 states[1] that impose sales and use taxes. In fact, at least 34 states, including North Dakota, have specifically amended their tax statutes to impose tax collection obligations upon direct marketers headquartered out-of-state.[2]

It is estimated that in 1985, as a result of their continued reliance on this Court's decision in *National Bellas Hess v. Department of Revenue*, 386 U.S. 753 (1967), direct marketers failed to collect state and local use taxes amounting to more than one billion dollars. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS (ACIR), NO. A-105, STATE AND LOCAL TAXATION OF OUT-OF-STATE MAIL ORDER SALES (Apr. 1986). By 1990, the estimated revenue loss to all states had grown to over three-and-a-half billion dollars. ACIR, REVISED REVENUE ESTIMATES, 1990-1992 (Dec. 1991). In addition, the tax-free advantage for multistate sellers created by *Bellas Hess* has unfairly undermined the efforts of local retailers to compete in the marketplace, thereby compounding the impact on the

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[1] Sales and use taxes are imposed in all states except Delaware, Montana, New Hampshire, and Oregon. *See* 1A ALL STATES SALES TAX REP., ¶ 8-410 (CCH).

[2] See list of states and statutes in Appendix A, at 1a.

states. The continued application of the *Bellas Hess* holding in this manner is obviously of grave interest to the *amici* states because of the enormous impact that ruling has had on state and local tax revenues.

SUMMARY OF ARGUMENT

1. The *National Bellas Hess* decision was based upon the now-defunct view that any state taxation of exclusively interstate commerce, regardless of the subject's connection to the taxing state and the nondiscriminatory nature of the tax being imposed, is prohibited. *Spector Motor Service v. O'Connor*, 340 U.S. 602, 610 (1951); *Freeman v. Hewit*, 329 U.S. 249, 253 (1946). The old analysis created an immunity from state taxation for corporations engaging in interstate commerce and effectively established a tax-free haven for direct marketing companies.

In the years since 1967, this underlying philosophy has been abandoned by this Court. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), held that interstate commerce should pay its fair share through local taxation, so long as there is sufficient connection to the taxing state, the tax is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to benefits received by the taxpayer. All four of these factors are satisfied in this and similar cases in which multistate direct marketing businesses purposefully avail themselves of local markets and services provided by state and local governments. The petitioner's insistence upon physical presence as the sole determinant of nexus contradicts the very purposes of the Commerce Clause and Due Process Clause, and results in an unfair advantage to multistate direct marketers. This Court should reject the petitioner's argument and recognize, as it did in *Goldberg v. Sweet*, 488 U.S. 252 (1989), that modern developments in technology and commerce require a more realistic approach to taxing jurisdiction.

2. The dramatic success of the direct marketing business since 1967, fostered by new technology and

exhibited in the significant business presence of such firms in local markets, has had an enormous impact on the states. Total mail order sales have soared from an estimated $2.4 billion in 1967 to as much as $183 billion in 1989. Computers have enabled companies located in one corner of the country to target potential customers throughout the nation with surgical precision, and to service those customers and process their orders more quickly and efficiently than they could with an army of door-to-door salesmen. Simultaneously, the de facto tax-exempt status of out-of-state companies has given those firms an unfair competitive advantage over local retailers. Certainly, the Commerce Clause was never intended to encourage tax evasion, and yet even direct marketers themselves concede that the states have lost over $9 billion since 1985 in uncollected use taxes on sales by multistate direct marketers.

This Court should end this inequity by holding that direct marketing companies that purposefully avail themselves of a state's market to their economic advantage can be required to collect use taxes from that state's residents.

3. Direct marketers benefit greatly from services provided by their market states. The enjoyment of these services establishes nexus and satisfies the fourth prong of the *Complete Auto* test. State and local governments, through their roads, schools, commercial laws, courts, and other general services, promote an organized and civilized society which, under *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981), is a sufficient benefit to demonstrate taxing jurisdiction. These governments also provide services that especially benefit direct marketers, such as local disposal of the hundreds of tons of catalogs purposefully directed into the market states. If the presence of a single solicitor is sufficient nexus, then surely the presence of so many catalogs, necessitating eventual disposal by state and local governments, establishes nexus. States also assure the provision of reliable telephone service through regulation of local telephone

exchanges, and regulate the financial institutions that issue credit cards that direct marketers accept in payment for their merchandise. Credit cards and telephonic contacts, both of which are regulated and promoted by the states, are essential in enabling direct marketers to achieve their current penetration of local markets.

4. The burden that direct marketers bear in collecting the use taxes of those states and localities in which they sell their products is commensurate with the benefits they derive from those states. The same computer technology that direct marketers use to target potential customers and to keep their own records enables them to comply easily and inexpensively with the use tax laws of the states into which they send their merchandise.

ARGUMENT

I.

BELLAS HESS IS FUNDAMENTALLY INCONSISTENT WITH THE MODERN UNDERSTANDING OF THE COMMERCE CLAUSE, ESPECIALLY IN TODAY'S MARKETPLACE.

A rule which grants certain out-of-state businesses de facto tax immunity and thus a substantial competitive advantage over local firms, notwithstanding the numerous benefits and contacts enjoyed by the nonresidents in their targeted market states, contradicts the fundamental purposes of the Commerce and Due Process Clauses. Those basic concerns, which include free trade and fundamental fairness, are ill-served by any renewed adherence to the *Bellas Hess* decision, which has long-since been reduced to an anachronism by the evolution of Commerce and Due Process Clause jurisprudence as well as by overarching changes in business and technology.

A. The Formalist Doctrine Immunizing Purely Interstate Commerce From State Taxation Has Been Abandoned.

When this Court decided *National Bellas Hess* nearly twenty-five years ago, it viewed the issues presented through the prism of its time, both factually and legally. Factually, the so-called mail order industry was in its infancy, both technologically and in terms of its economic impact on local markets. Legally, Commerce Clause jurisprudence in 1967 still followed the now-defunct view that purely interstate commerce was immune from state taxation, without regard to the subject's connections to the taxing state or the nondiscriminatory nature of the tax being imposed. *Spector Motor Service v. O'Connor*, 340 U.S. 602, 610 (1951); *Freeman v. Hewit*, 329 U.S. 249, 253 (1946). It was in this context that the *Bellas Hess* Court declared the imposition of use-tax-collection responsibilities upon multistate mail order companies unconstitutional as an unacceptable local intrusion into the arena of interstate commerce. 386 U.S. at 759-760. *See generally* Rothfeld, *Mail Order Sales and State Jurisdiction to Tax*, Tax Notes, Dec. 23, 1991; Hartman, *Collection of the Use Tax on Out-of-State Mail-Order Sales*, 39 VAND. L. REV. 993 (1986).

Since 1967, however, this Court has directly repudiated that principle. In *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), the Court unanimously overruled *Spector Motor* (430 U.S. at 289) and rejected "the philosophy of [the *Freeman*] rule" (430 U.S. at 288). Insisting on an approach to Commerce Clause questions based on "economic realities" (430 U.S. at 279), the Court explicitly abandoned what it has since aptly described as *Freeman*'s "formalistic approach" that kept certain transactions simply out of reach of state taxing authorities. *Trinova Corp. v. Michigan Dep't of Treasury*, ___ U.S. ___, 111 S.Ct. 818, 828 (1991). The critical doctrinal underpinning of *Bellas Hess* is thus no longer appropriate.

With *Complete Auto*, interstate commerce can now "be made to pay its way" through local taxation, as long as the taxed activity is sufficiently connected to the taxing state, the tax is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to benefits received by the taxpayer. 430 U.S. at 284, 287. This fundamental change in the law itself compels alteration of *Bellas Hess* to comport with the more realistic, modern approach embodied in *Complete Auto*.

All four of the *Complete Auto* factors are satisfied in cases such as the present one in which multistate direct marketing businesses purposefully avail themselves of local markets and are asked only to collect a use tax from in-state residents who purchase goods for local consumption. Such a collection responsibility, applied uniformly to sales made by in-state and out-of-state retailers, and which cannot result in compounding the tax, is fairly apportioned and does not discriminate against interstate commerce, thus satisfying the second and third prongs of *Complete Auto*. As discussed *infra* at Part III, the nonresident multistate retailers enjoy significant benefits from their market states, thus satisfying the fourth prong of the analysis, that the tax be "fairly related to services provided by the state." 430 U.S. at 279. Finally, the substantial contacts and pervasive business presence of such marketers within the taxing states today satisfy the *Complete Auto* nexus requirement.

B. Reliance On Physical Presence As The Essential Precondition to State Taxing Jurisdiction Is Neither Constitutionally Nor Practically Realistic.

The *Bellas Hess* Court's rejection of Illinois's use tax statute was based largely on its concern about taxing interstate commerce at all. Specifically noting that it was "difficult to conceive of commercial transactions more exclusively interstate in character than the mail order transactions here involved," the Court ruled that the duty

of collecting use taxes could not be imposed on businesses whose only connection with the taxing state was "by common carrier or the United States mail." *Id.* at 758, 759. In the years since *Bellas Hess* was decided, many courts and commentators have interpreted that decision to stand for the proposition that actual physical presence within the taxing state – even if it is the presence of only "a few warm bodies" – is constitutionally necessary for a state to require collection of its tax. *See, e.g., SFA Folio Collections, Inc. v. Bannon*, 217 Conn. 220, 585 A.2d 666 (1991); Hartman, *supra*, 39 VAND. L. REV. at 1014; petitioner's brief at 32. The decision in *Bellas Hess* has thus ossified into a rigid rule that out-of-state direct marketing companies can never be made to collect state use taxes, a rule that is outdated and inconsistent with current constitutional analysis.[3]

Petitioner asks this Court rigidly to require physical presence as a sine qua non of nexus, regardless of the nature and extent of commercial activities within a taxing state. The only proffered justification for applying such a wooden and unrealistic standard is purported ease of application. But the Commerce Clause cannot be interpreted merely for administrative convenience. As this Court has held, "Administrative convenience, in this instance, is insufficient justification for abandoning the principle that 'interstate commerce may be made to pay its way.' " *Complete Auto*, 430 U.S. at 288 n.15.

In closely related areas of constitutional law, this Court has readily moved away from strict requirements of physical presence. Instead, the Court has adopted a more flexible and realistic approach, focusing on whether

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[3] Justice Rutledge's dissent in *McLeod v. Dilworth*, 322 U.S. 349 (1944), argues powerfully that economic substance, rather than rigid, technical legal rules, should frame the Court's analysis of state taxing power. Justice Rutledge's analysis was essentially adopted in *Complete Auto*.

a business has "purposefully directed" its commercial efforts at residents of the state. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985). In *Burger King*, the Court noted, in the personal jurisdiction context, that "it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communication across state lines, thus obviating the need for physical presence within a state in which business is conducted." *Id.* at 476. Hartman, *supra*, at 1014. Such an approach is also warranted in the area of use tax collection by direct marketers.

It makes little sense that the presence of a few solicitors or a single office within a state provides a sufficient nexus to require the collection of a state use tax, as in *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960), yet the calculated exploitation of a state's market by mailing millions of catalogs and reaping billions of dollars in sales does not.[4] Sales generated by a few solicitors employed by a small out-of-state firm going door-to-door cannot compare to the enormous volume of sales generated within a state by demographically-targeted catalogs produced by a technologically superior direct marketer. And yet, under the petitioner's interpretation of *Bellas Hess*, the former company would be required to collect tax while the latter giant corporation would not. Such a result – particularly one purportedly premised on the Commerce Clause and Due Process – no longer makes sense. Recognizing business presence as the nexus touchstone would comport not only with *Complete Auto* jurisprudence, but with current economic and commercial reality as well.

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[4] For example, in fiscal 1990 alone, one company, Land's End of Chicago, mailed a total of 91,000,000 catalogs averaging 162 pages each to customers throughout the United States, generating hundreds of millions of dollars in sales. *See Lands' End, Inc. v. California State Board of Equalization*, No. 620135, Superior Court of California, San Diego County (appeal pending) (Stipulation, ¶14).

Significantly, in its most recent major decision concerning state taxing jurisdiction, this Court recognized that modern technological developments require an updated and flexible approach to taxing nexus. In *Goldberg v. Sweet*, 488 U.S. 252 (1989), this Court upheld an Illinois tax on the gross charges for interstate telecommunications originated or terminated in Illinois and charged to an Illinois service address. The case arose "against a backdrop of massive technological and legal changes in the telecommunications industry," 488 U.S. at 254, changes that also form the background of the instant case. In affirming the Illinois Supreme Court decision that upheld the tax, this Court abandoned an earlier line of cases because they had "considered a telecommunications technology only distantly related to modern telecommunications technology and were decided in a pre-*Complete Auto* era when this Court held the view that interstate commerce itself could not be taxed." 488 U.S. at 265 n.16. The Court reasoned that the Illinois tax readily satisfied all of *Complete Auto's* prongs, noting that two states had nexus sufficient to tax an interstate telephone call: the state where the call originates and the state where the call terminates, so long as the call is charged to a service address or billed or paid within the state. 488 U.S. at 263.

In the instant case, the transformation of the mail order industry parallels the changes in telecommunications that lay at the heart of *Goldberg*. In the typical mail order sale, the transaction with the direct marketer originates in the purchaser's state with the placing of an order. The cost of the sale is billed or charged to the purchaser in his home state. Thus considering the analogy to an interstate telephone call, the transaction originates and is paid from the market state. Under *Goldberg*, the purchaser's state would have abundant nexus with the out-of-state direct marketer, sufficient to require collection of sales and use taxes.

In fact, in the context of a mail order sale, the jurisdictions having the "connections" of which *Complete Auto's* first prong speaks include the purchaser's state and the seller's state. Petitioner, however, claims no duty to report a sales or use tax to any state on most of its business. Since interstate commerce is no longer immune from taxation, a mail order transaction must have nexus somewhere, contrary to petitioner's view that it operates on an ethereal plane immune from all state obligations.

This Court has recognized that *Complete Auto* now requires a reevaluation of the doctrinal underpinnings of many earlier Commerce Clause cases which were based on the *Spector* and *Freeman* assumption of state tax immunity for exclusively interstate business. *Department of Revenue Services v. Ass'n of Washington Stevedoring Cos.*, 435 U.S. 734, 745-46 (1978). The imposition of a use-tax-collection responsibility on multistate direct marketers like Quill that purposefully and systematically avail themselves of local markets satisfies all four prongs of *Complete Auto*. The petitioner in effect asks this Court to ignore *Complete Auto* and restore the obsolete tax-free trade zone analysis. This argument should be rejected, and the North Dakota statute should be upheld.[5]

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[5] Both courts and commentators have frequently criticized the holding of *Bellas Hess*, especially as it has been applied in recent years to bar use-tax-collection duties for multistate direct marketers in the face of technological and social developments. *See* Hartman, *supra*; McCray, *Overturning Bellas Hess: Due Process Considerations*, 1985 B.Y.U.L. Rev. 265; Rothfeld, *supra*; *North Dakota v. Quill*, *supra*. In a similar situation involving another 1967 case, *United States v. Arnold Schwinn & Co.*, 388 U.S. 365 (1967), this Court recognized the need to update an outmoded precedent, noting that,

> Since its announcement, *Schwinn* has been the subject of continuing controversy and confusion, both in the scholarly journals and in federal courts. The great weight of scholarly opinion has been critical of

(Continued on following page)

II.

DRAMATIC DEVELOPMENTS IN DIRECT MARKETING SINCE *BELLAS HESS* HAVE CONTRIBUTED TO THE PERVASIVE BUSINESS PRESENCE OF THOSE FIRMS WITHIN THE STATES AND HAVE HAD A TREMENDOUS IMPACT ON THE ECONOMIES OF THE STATES.

The dramatic development of the direct marketing industry, and the tremendous economic impact that direct marketing firms have had on targeted states, could not have been envisioned at the time of *Bellas Hess*. These developments make clear that the holding in *Bellas Hess* is unrealistic and unsuited to today's commercial environment.

In 1967, total mail-order sales were estimated at $2.4 billion. *Bellas Hess*, 386 U.S. at 763 (Fortas, J., dissenting). By 1989, direct marketing sales estimates were in the neighborhood of $183 billion, *North Dakota v. Quill*, 470 N.W.2d 203, 221 and n.7, up from $150 billion just four years earlier. *Hartman, supra*, at 1006. Significantly, the rate of growth of direct marketing sales for the period 1974-1985 far exceeded the growth rate of local retail sales. One estimate pegs the rate of growth for this period at more than 200%, or 50%-100% higher than the in-store retail growth rate for the same period. M. SROGE, INSIDE THE LEADING MAIL ORDER HOUSES, ix (3rd ed. 1989).

(Continued from previous page)

> the decision, and a number of the federal courts confronted with analogous vertical restrictions have sought to limit its reach. In our view, the experience of the past 10 years should be brought to bear on this subject of considerable commercial importance.

Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 47-49 (1977). *See also Payne v. Tennessee*, 501 U.S. ___, 115 L.Ed.2d 720 (1991)(stare decisis should not prevent reevaluation of constitutional doctrines).

Between 1980 and 1989, it is estimated that direct marketing sales grew at an average rate of 15% a year, compared to an average 5% annual increase in local retail sales. Bruce, *Industry Outlook: What Happens Next*, DM News, June 18, 1990, p. 13. In fact, direct-mail marketing now accounts for between 15% and 25% of all retail sales in this country. Hartman, *supra*, at 1007-08. Just as important, the number of customers responding to direct marketers increased 60% between 1983 and 1989, to an estimated 92 million Americans. TIME, *Read This*, Nov. 26, 1990, at 62-63.

The phenomenal growth of the direct marketing industry over the past twenty years has been made possible by the concomitant revolution in technology available to marketers. As one industry analyst has observed, "The application of computers in mail order marketing has revolutionized the business," increasing profitability by enabling marketers to focus "specifically and exclusively on those prospects most likely to become customers." M. SROGE, *supra*, at viii. The computerized segmentation of target populations based on demographic information has reached a precision which can create targeted customer lists in units "as small as a city block." *Id.* Many direct marketers are very selective in their merchandising, appealing to members of scattered interest groups that are not numerous enough to support a retail store in any one locality, but which provide a lucrative nationwide market. *See generally* Ulbrich, Changes in the Mail Order Industry Since 1967 (1990) (unpublished paper), Exhibit B to Affidavit of Holley H. Ulbrich in Tennessee's *Bloomingdale's* litigation, reprinted in Appendix B at 6a-26a.[6]

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[6] *Bloomingdale's By Mail Ltd. v. Huddleston*, No. 89-3017-II, Chancery Court of Davidson County, Tennessee (summary judgment entered in favor of the State, upholding the use-tax-collection duty, March 21, 1991), appeal pending before Supreme Court of Tennessee at Nashville, No. 01-S-01-9106-CH-00047 (argued October 3, 1991).

Other technological advances such as toll-free "800" phone lines, fax machines, electronic bulletin boards, cable television, and computer-to-computer linkups, have enabled direct marketing companies to reach into every neighborhood in America more effectively, efficiently, and profitably than an army of solicitors ever could. Developments in the use of credit cards, including instantaneous electronic authorization of credit card purchases, have greatly contributed to the growth of direct marketers' sales over the telephone.[7]

These technological developments – barely imagined in 1967 – show no signs of abating; on the contrary, all indications are that direct marketing will continue to grow. All of these advances in electronic communications, transportation, and the storing and processing of information now enable multistate direct marketers effectively to function as local retailers and to participate fully in state-created markets. The impact of this direct marketing invasion on the economies of the states has been tremendous. It is estimated that uncollected taxes from sales by direct marketers translated into one billion dollars in revenue lost to the states in 1985 (ACIR, No. SR-5, ESTIMATES OF REVENUE POTENTIAL FROM STATE TAXATION OF OUT-OF-STATE MAIL ORDER SALES (Sept. 4, 1987), at 8), and as much as three-and-a-half billion in 1990. ACIR, REVISED REVENUE ESTIMATES, 1990-1992 (Dec. 1991).

The tremendous diversion of income to multistate marketers has created a competitive disadvantage for local retailers and further damaged local economies. Although free interstate competition is the goal of the Commerce Clause, the avoidance of tax on direct marketing purchases gives out-of-state marketers a competitive edge that local retailers cannot match. The amount of

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[7] Indeed, the very term "mail order" used in *Bellas Hess* is obsolete, since most orders are placed electronically over "800" telephone lines, or directly by computer, not by mail.

retail business lost on account of the tax advantage is impossible to calculate with precision, but the price differential caused by the avoidance of tax rates in the five-to-eight percent range undeniably creates a distinct advantage for out-of-state companies, especially on sales of big ticket items. *See* ACIR, No. A-105, at 5; Rothfeld, *supra*, at 2 & n.15.[8]

The very purpose of the Commerce Clause is to ensure that interstate commerce can compete with local commerce on an even playing field, with no competitive disadvantage to multistate business caused by protectionist local legislation. *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254-256 (1938). Yet the application of *Bellas Hess* to bar use-tax-collection responsibilities has had the undeniable effect of providing a competitive advantage to out-of-state direct marketers over local retailers. *See* McCray, *Commerce Clause Sanctions Against Taxation of Mail Order Sales: A Re-Evaluation*, 17 URBAN LAWYER at 529, 530 (1985). This unfair competitive advantage has compounded the revenue lost to the states. Since it has reduced sales by local retailers, it has resulted in lower state sales tax receipts from local stores. The loss of sales by local retailers also results in a loss of jobs for local residents and hurts local companies. In the unimpeded interstate economy envisioned by the Commerce Clause, a loss to local retailers as a result of *fair* interstate competition may be constitutionally unavoidable. In this case, however, the loss is occasioned by the *unfair*

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[8] "Looking beyond the revenue loss and resulting inequity, there is the issue of unfair business competition. Through an implicit offer of the opportunity to evade the use tax, a mail order company can begin several percentage points ahead of nationwide mail order companies, such as Sears or J.C. Penney, and every neighborhood merchant - all of whom must collect taxes." Chu, *Stopping Sales Tax Evasion: The Catalogue Loophole Must Be Closed*, N.Y. Times, Aug. 18, 1985; *see* Hartman, 39 VAND. L. REV. at 1013.

advantage exploited by out-of-state marketers who operate in what has essentially become a tax-free zone. Such a result is not constitutionally mandated and is, indeed, at odds with the purposes of the Commerce Clause.

III.

DIRECT MARKETERS EXPLOIT SUBSTANTIAL CONTACTS WITH THEIR MARKET STATES AND ENJOY SIGNIFICANT BENEFITS PROVIDED BY STATE AND LOCAL GOVERNMENTS.

It is perfectly fair to impose state and local use-tax-collection duties on multistate direct marketers, because the services that state and local governments provide are essential to the success of those businesses. The reality is that direct marketing firms, whether large or small, could not successfully market their products if states and localities did not provide a myriad of services for them. Consequently, multistate direct marketers should share the local tax burdens that support the services from which they benefit.

As early as *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435 (1940), this Court observed that an important Due Process concern focuses on "whether the taxing power exerted by the state bears fiscal relation to protections, opportunities and benefits given by the state." 311 U.S. at 441-42. This notion was later formulated as part of the test for state taxing jurisdiction under the Commerce Clause: the fourth prong of the test announced in *Complete Auto* requires that "[t]he tax must be fairly related to benefits and services provided by the State." 430 U.S. at 287. Such services need not correspond precisely to the tax obligation, so long as the taxpayer benefits from the civilized economic and social milieu fostered by the state. *See Goldberg*, 488 U.S. at 267. The point was expressed most

clearly in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, when the Court reiterated its "consistent rule" that,

> A tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. Any other view would preclude the levying of taxes except as they are used to compensate for the burden on those who pay them, and would involve abandonment of the most fundamental principle of government – that it exists primarily to provide for the common good.

453 U.S. at 622-23 (quoting from *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 521-23 (1937)). Thus this Court already has made clear that for purposes of the *Complete Auto* test, the benefits to the taxpayer need not be direct or proportionate; general government services that facilitate their business are sufficient to establish state taxing power over mail order firms.

Of the myriad of state services that benefit direct marketers, several are readily apparent. State and local governments build and maintain the roads that allow direct marketers to ship their goods from out of state. State-supported school systems educate potential customers with interests, refinements, and desires to which direct marketers can appeal. The states provide other general services that benefit all businesses, such as crime prevention and maintenance of a system of commercial laws[9] which fosters a free economy while lending

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[9] These laws include the Uniform Commercial Code, the Uniform Consumer Credit Code, and consumer protection acts, among many others.

structure and certainty to commercial transactions. All of these things contribute to the ordered and civilized society of which the cases speak, benefitting direct marketers as well as local stores. Even without more, these services would be sufficient to justify the use-tax-collection duty.

In addition to such general benefits, state and local governments provide services that especially further the success of mail order firms. One service vital to direct marketers is local disposal of the vast quantities of catalogs and other paper that flood into their boundaries from distant mail order firms, evoking environmental concerns unrecognized at the time of *Bellas Hess*. These catalogs are time-sensitive and designed to be discarded; most are printed on slick, nonrecyclable paper. The quantities of paper involved are astronomical, as already demonstrated by the 91,000,000 catalogs, averaging 162 pages each, distributed by only one firm, Lands' End, in fiscal 1990. (See note 4 *supra*.) State and local trash disposal systems are greatly burdened by the task of handling this tremendous volume of waste paper.

The largest component of solid waste in this country is paper, comprising nearly 40% of the total.[10] Of course, state and local governments must provide for the pick-up, treatment, and disposal of this garbage. In particular, concerns about long-term disposal of trash have multiplied in recent years, with the approaching obsolescence of many landfills and growing environmental concerns about incineration and the siting of new landfills. Almost every state in the country has recently enacted or is considering legislation addressing solid waste problems. State agencies are being reorganized and redirected to respond with increased vigor on solid waste disposal issues. These latter-day concerns contrast sharply with

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[10] *See* U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, OTA-0-424, FACING AMERICA'S TRASH – WHAT NEXT FOR MUNICIPAL SOLID WASTE, Chap. 3 at 73-84 (Oct. 1989).

the notable lack of attention to waste management during the *Bellas Hess* era.[11]

Mail order firms disingenuously argue that these garbage disposal services are of no benefit to them, that the services benefit only their customers in the several states. Such an argument is far too shortsighted and unrealistic for constitutional analysis under *Complete Auto*. In the first place, most catalogs come unsolicited and unwanted by the recipients, many of whom have never been customers of the sending mail order firm. Regardless of technicalities as to title, the catalogs are designed and transmitted for the profit-making purposes of the direct marketer.[12] It is of no significance whether the benefit is considered direct or indirect; even indirect benefits satisfy the *Commonwealth Edison* analysis. What is important is that the disposal of used catalogs places a significant burden on state and local services and, in any realistic view, greatly benefits multistate catalog retailers by facilitating the use of the catalogs on which they depend for business.

Another state-provided benefit crucial to direct marketers is the assurance of reliable telephone service through the extensive regulation of local telephone exchanges and their rates and the requirement of universal service.[13] Indeed, the significance of this service to direct marketers has emerged since the days of *Bellas*

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[11] *Id.*, Chap. 8 at 299-331.

[12] Mail order firms are "present" in their market states through the vast quantities of their catalogs. In *D.H. Holmes Co. v. McNamara*, 486 U.S. 24 (1988), this Court held that states may impose use tax on the catalogs themselves, even when they are purchased by the retailer and shipped from out-of-state.

[13] Through their utilities commissions, states pervasively regulate telephone service. *See, e.g.*, CAL. CONST., Art. XII, § 3 and CAL. PUB. UTIL. CODE; TENN. CODE ANN., tit. 65, chaps. 4, 5, 21, 29; WASH. REV. CODE, tit. 80, chaps. 01, 04, 36.

Hess, because of the major technological changes in recent years.[14] Electronic communication was not a factor in the *Bellas Hess* decision. Indeed, the Court expressly noted that Bellas Hess "ha[d] no telephone listing in Illinois . . . ."[15] Since that time the development and proliferation of "800" telephone numbers has transformed direct marketing, enabling distant firms inexpensively to maintain the equivalent of a local telephone listing in every exchange in the country and thus compete effectively with local retailers.[16] For example, in California's litigation with Lands' End, the parties stipulated that Lands' End provides six hundred "800" telephone lines, involving no cost to any customer, available for orders 24 hours every day except Christmas. See note 4 *supra*. In Tennessee's *Bloomingdale's By Mail* case, see note 6 *supra*, discovery revealed that most of that firm's orders are taken over the telephone.

In addition to the great enhancement in the convenience and ease of placing orders, the "800" lines enable direct marketers to benefit from much the same personal contact with their customers as would occur at a local store. Moreover, this contact also makes compliance with local tax laws easier, by enabling the retailer to inform its

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[14] *See Goldberg*, 488 U.S. 252 (1989), discussed *supra* at 10, which recounts developments in electronic communications and discusses the adaptation of legal doctrines to those changes.

[15] 386 U.S. at 754 (quoting opinion of Illinois Supreme Court, 34 Ill.2d 164, 166-67, 214 N.E.2d 755, 757 (1966)). Justice Stewart premised the *Bellas Hess* holding on the finding that the business of that company was carried out exclusively by mail or common carrier. 386 U.S. at 758.

[16] Indeed, since many of the "800" telephone lines are available for orders 24 hours a day, direct marketers often are more convenient to their customers for the making of purchases than are local stores.

distant customer of the exact cost of his purchase, including sales and use taxes, virtually eliminating billing errors that might occur through mail transactions. All of these benefits to direct marketers depend on state regulation of local telephone service, and are fostered by state policies that promote inexpensive telephone service and a broad subscriber base. State agencies are playing evermore important roles in regulating telecommunications now that the federal government is focusing on deregulation.[17]

Similarly, state regulation of financial institutions is essential to the success of direct marketing. Modern direct marketers depend heavily upon their customers' use of credit cards issued by in-state banks. The credit card system functions well in significant part because the states closely regulate banks and other financial institutions that issue those cards. Like "800" numbers, credit card networks have developed since the *Bellas Hess* decision. Together, these two advances, both significantly promoted by state regulation and policy, are principally responsible for the character of modern direct marketing, its tremendous success, and its transformation of retailing in America.

A high percentage of sales by credit card is the norm for mail order companies today.[18] Eighty-six percent (86%) of Lands' End's sales are made through acceptance of a customer's credit card, according to the stipulation in the pending California case. See note 4 *supra*. In the California litigation with both Lands' End and the Direct

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[17] *See* P. Teske, After Divestiture: The Political Economy Of State Telecommunications Regulation, p. xiii (1990).

[18] In Tennessee's *Bloomingdale's* case, it was established that most purchases from that firm were made by credit card. See note 6 *supra*.

Marketing Association,[19] those plaintiffs stipulated that a substantial portion of credit card sales to California customers involve cards issued by California financial institutions. Credit card merchant banks (to which direct marketers submit approved credit card charges for payment) provide those direct marketers with electronic equipment that enables the in-state bank that issued the credit card (or by an entity acting on behalf of that in-state bank) instantaneously to inform the retailer that it guarantees payment of the purchase. The direct marketer then provides the merchant bank with evidence that the transaction has been approved by or on behalf of the card-issuing institution, thereby ensuring that payment, at a discount, will be forthcoming to the direct marketer and shifting to the card-issuing institution the task of collecting the debt.[20] Moreover, the pervasiveness of national credit cards issued by local banks enables direct marketers to make sales on credit without developing their own cumbersome credit systems or becoming directly involved in debt collection, at enormous cost-saving benefit to the retailers. The precise nature of credit card transactions is set out in detail in the stipulation in California's *DMA* case. *See* Appendix C, at 27a-44a.

Multistate retailers also benefit from state efforts to foster a climate of consumer confidence. State consumer protection agencies and laws assure the public that businesses will deal fairly with them and that redress can be had for abuses. This is especially important to individuals who are purchasing goods sight-unseen from distant

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[19] *Direct Marketing Association v. Bennett*, No. CV-S-88-1067-MLS, E.D. Cal. (see Appendix at 28a-29a n.1).

[20] Obtaining credit card authorization ensures payment to the seller for the sale. As a result, the industry practice is to refuse sales for which electronic approval is not given. The mechanics of credit card transactions were detailed in *Colorado Springs National Bank v. United States*, 505 F.2d 1185 (10th Cir. 1974).

firms. Indeed, in many states a large proportion of consumer complaints handled by state agencies relate to out-of-state direct marketers.[21] Reputable mail order firms benefit from consumer protection laws that target fly-by-night direct marketers and create a fair business environment for all participants. Additionally, state regulations such as consumer protection and usury laws apply to mail order transactions.[22] It is clear that state courts can exercise personal jurisdiction over multistate firms that do business with their residents.[23] Of course, the availability of the state court system benefits direct marketers in many ways. While most such firms claim not to engage directly in debt collection, a bank or other entity must eventually be able to collect on credit purchases, and in doing so is dependent on state courts.[24] The ability of

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[21] Alabama and Missouri report that 20-25% of all consumer complaints involve out-of-state direct marketers. In New Mexico and Oregon, such complaints comprise the second largest volume of all reported complaints, next to automobile complaints and telephone marketers, respectively. Texas reports that mail order and catalog sales consistently rank approximately tenth among the thirty categories of most frequent consumer complaints.

[22] *See State ex rel. Meierhenry v. Spiegel, Inc.*, 277 N.W.2d 298 (S.D.), *appeal dismissed*, 444 U.S. 804 (1979) (enforcement of state consumer protection laws); *Aldens, Inc. v. Miller*, 610 F.2d 538 (8th Cir. 1979), *cert. denied*, 446 U.S. 919 (1980) (application of market state's usury laws to out-of-state mail order retailer); *Aldens, Inc. v. Ryan*, 571 F.2d 1159 (10th Cir.), *cert. denied*, 439 U.S. 860 (1978) (same); *Aldens, Inc. v. LaFollette*, 552 F.2d 745 (7th Cir.), *cert. denied*. 434 U.S. 880 (1977) (same); *Aldens, Inc. v. Packel*, 524 F.2d 38 (3d Cir. 1975), *cert. denied*, 425 U.S. 943 (1976) (same).

[23] *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985).

[24] The Federal Trade Commission requires suits instituted by mail order firms to be brought in the customer's home state. *See Spiegel, Inc. v. Federal Trade Commission*, 540 F.2d 287 (7th

(Continued on following page)

in-state purchasers to sue direct marketers in their state courts also increases the confidence of consumers in dealing with out-of-state companies.

Multistate direct marketers of every size thus enjoy a myriad of services provided by state and local governments. Indeed, absent the role of these governments, direct marketers would not be able to penetrate and saturate local markets as they have in recent years. Thus it is entirely appropriate, and consistent with the approach of *Complete Auto*, to require direct marketers to contribute to the local services from which they benefit. Compliance with the use-tax-collection duty[25] is a very minimal obligation to impose upon businesses that reap such great rewards from the states' marketplaces.

(Continued from previous page)

Cir. 1976). In addition, when a purchaser tenders a check directly to a mail order firm, it would sue on that check in the courts of the purchaser's state.

[25] Indeed, if the direct marketer dutifully collects the use taxes from its customers and remits them to the states, it will bear no separate obligation. Many states provide for vendors' compensation for sellers' collection efforts; such statutes allow vendors, including direct marketers, to retain a portion of the sales and use taxes that they collect on behalf of the state. *See, e.g.*, FLA. STAT. ANN. § 212.12(1) (Supp. 1990); GA. CODE ANN. § 48-8-50; IDAHO CODE § 63-3619(c); IND. CODE ANN. § 6-2.5-6-10; KY. REV. STAT. ANN. § 139.570; MO. ANN. STAT. § 144.140 (1986); TENN. CODE ANN. § 67-6-509 (Supp. 1990); TEX. TAX CODE ANN. § 151.423-.424 (Vernon 1982).

IV.

ANY BURDENS OF THE USE-TAX-COLLECTION DUTY ON DIRECT MARKETERS ARE COMMENSURATE WITH THE BUSINESS THEY DERIVE FROM STATE MARKETS AND DO NOT SIGNIFICANTLY HINDER THEIR ACTIVITIES IN MULTIPLE JURISDICTIONS.

In the twenty-five years since the *Bellas Hess* decision, developments in computer technology have brought about the greatest revolution in compiling, transmitting, and using information since the invention of written language. The same computer capabilities that in recent years have enabled direct marketers to target potential customers, refine mailing lists, utilize customer purchasing histories, and process orders, invoices, and payments, also enable them to comply easily with the use tax laws of the jurisdictions into which they choose to send their solicitations and merchandise.[26] Therefore, even assuming that examination of burdens placed on direct marketers by the use-tax-collection duty is at all relevant under the *Complete Auto* analysis, such burdens are constitutionally insignificant.

The modern realities of business belie direct marketers' assertions that tax compliance in numerous jurisdictions would be well-nigh impossible. Many conventional retailers have administratively distinct mail order divisions but have complied with use-tax-collection duties in all jurisdictions for many years, pursuant to this Court's decisions in *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359, *rehearing denied*, 312 U.S. 715 (1941), and *Nelson v. Montgomery Ward*, 312 U.S. 373, *rehearing denied*,

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[26] *See* Westphal, *The Computer's Role in Simplifying Compliance with State and Local Taxation*, 39 VAND. L. REV. 1097 (1986).

312 U.S. 716 (1941). In practice, their difficulties in compliance are identical with those that Quill and others would face, since the mail order business of these firms is distinct from their retail outlets. Nonetheless, this Court held in *National Geographic Society v. California Board of Equalization*, 430 U.S. 551 (1977), that the use-tax-collection duty can be imposed even when the in-state operations that give rise to that duty are unrelated to the making of sales. The lamentations of Quill and other direct marketers about the difficulties of compliance are unfounded in light of modern technological advances, and amount to no more than an effort to evade their fair share of state and local responsibilities and to ensure their continued unfair advantage over local retailers who do collect the taxes.[27]

Petitioner and its amici complain that 6,500 local jurisdictions levy use taxes at differing rates, and that compliance would create virtually an insurmountable burden for out-of-state companies. This argument grossly distorts reality. In truth, many states, like North Dakota and Connecticut, authorize *no* local sales and use taxes at all. Of those states that do, the vast majority provide for centralized administration of all taxes by the state taxing authority. In fact, the Direct Marketing Association's own figures reveal that, of the 46 states in which sales and use taxes are imposed, at least *40* states require only *one* return to be filed to cover all the taxing jurisdictions

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[27] Indeed, many direct marketers simply instruct the customer to enter the appropriate state and local taxes on the order form. While a few customers may calculate the tax incorrectly (just as they may calculate prices or delivery charges incorrectly), substantial compliance is effectuated. Since most orders today are made and accepted over the telephone, most calculations are made by the direct marketer itself. Any quibbling that may occur over accounting details is far too trivial to affect the constitutional scope of the states' taxing power.

within that state. *See amicus* brief of Direct Marketing Association, Appendix 3. Some states provide for a uniform statewide rate for out-of-state vendors, *see, e.g.*, CAL. REV. & TAX CODE § 6203(j), while others offer out-of-state vendors the option of a uniform rate. *See* TENN. CODE ANN. § 67-6-702(f); Wash. Admin. Code, Rule 458-20-221(5).

Similarly, the petitioner's complaint of a myriad of exemptions is a mere red herring. In practice, exemptions are established by statutes of statewide applicability, making the number of variations quite small. The administrative landscape is thus quite different from the one painted by the petitioner.

In fact, for companies like the petitioner, whose very ability to compete successfully on a national basis has been made possible by sophisticated computer programs and capabilities, the cry of administrative compliance burdens is disingenuous to say the least. Evidence in the Tennessee litigation established that readily available computer programs already exist that can easily and quickly calculate the tax rate for *every* jurisdiction, large and small, throughout the United States, taking account of exceptions and peculiarities of each jurisdiction, and at the same time preparing returns for filing in compliance with both state and local requirements. As one computer expert has stated, existing computers and software are "specially suited for use by companies whose business reaches into a multitude of state and local taxing jurisdictions."[28] Furthermore, the necessary software is available at a cost of only $12,000 for initial purchase plus $10,000 per year for servicing and monthly updates, and is compatible with all major brands of computers, including

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[28] Affidavit of Ray Westphal, ¶ 4, Record at 193, in *Bloomingdales' By Mail Ltd. v. Huddleston* (see note 6 *supra*), reproduced herein as Appendix D at 45a-62a. Currently this software contains data for over 50,000 locations. (Record at 196, Exh. A at p. 3; Appendix at 51a).

personal computers.[29] The direct marketers' lament that only large companies that can afford mainframe computers can benefit from this technology is simply untrue.

Thus, the collection of use taxes is not unduly burdensome, as the petitioner claims. Rather, it is just another cost of doing business, no more expensive or cumbersome than all the other administrative and logistical necessities associated with doing business on a multistate basis, and certainly not disproportionate to the benefits direct marketers receive. Nor is it greater than the burdens local businesses bear when one considers their liability for property, excise, business, employment, payroll, and other taxes.

Since *Bellas Hess*, this Court has not restrained state taxing jurisdiction because of compliance concerns so long as the tax is nondiscriminatory and fairly apportioned.[30] As the Court determined in *Complete Auto*, "It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business." 430 U.S. at 288 (quoting *Western Live Stock*, 303 U.S. at 254). The principle that "interstate commerce may be made to pay its way" not only acts as a limit on Commerce Clause restrictions imposed on the states; it is itself an affirmative, constitutionally rooted protection of the states, implicit in the commitment of our constitutional structure to a federal system that protects traditional state powers, including the power to tax those who exploit state protections.

Quill and other direct marketers claim that their operations should not be burdened by the regulatory and taxing powers of the states toward which they purposefully direct their efforts and from which they derive

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[29] *Id.*, Record at 192, Appendix at 48a.

[30] *See* Rothfeld, *supra*, at 9.

their business and profit. This assertion is a thinly-disguised attempt to breathe new life into the discredited doctrine that exclusively interstate commerce should be beyond the taxing jurisdiction of the states. That doctrine, which provided the foundation for the *Bellas Hess* decision, has been thoroughly and properly rejected in *Complete Auto* and subsequent cases, and there is no sound reason to revive it now.[31]

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[31] The Direct Marketing Association, at pages 6-7 of its *amicus* brief, wholly mischaracterizes the position of Professor Paul J. Hartman in stating that he advocates only a legislative overruling of *Bellas Hess*. As Professor Hartman has made very clear in his extensive writings on this issue, he believes *Bellas Hess* was wrongly decided even in 1967 and that its holding cannot be reconciled with the *Complete Auto* test. While he believes that congressional action could be helpful in this area, he prefers it to occur against a backdrop of judicial recognition of the states' powers to tax and regulate catalog firms that purposefully avail themselves of state marketplaces. As Professor Hartman stated quite vividly in one of his articles, "the Supreme Court could – and should – relegate the *Bellas Hess* decision to the dustbin of unconstitutional oblivion." Hartman, *Collection of the Use Tax on Out-of-State Mail-Order Sales*, 39 VAND. L. REV. at 1008 (1986); P. HARTMAN, FEDERAL LIMITATIONS ON STATE AND LOCAL TAXATION 618-37 (1981).

CONCLUSION

For these reasons, Connecticut, Tennessee, California, and the other *amici* states urge that the decision of the Supreme Court of North Dakota be affirmed.

Respectfully submitted,

December 26, 1991

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No. 91-194

In The

Supreme Court of the United States

October Term, 1991

QUILL CORPORATION,

Petitioner,

v.

STATE OF NORTH DAKOTA,
BY AND THROUGH ITS TAX COMMISSIONER,
HEIDI HEITKAMP,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of North Dakota

APPENDIX TO BRIEF OF THE STATES OF CONNECTICUT, TENNESSEE, CALIFORNIA, ARKANSAS, FLORIDA, GEORGIA, IDAHO, ILLINOIS, IOWA, KENTUCKY, LOUISIANA, MARYLAND, MASSACHUSETTS, MICHIGAN, MISSISSIPPI, NEVADA, NEW YORK, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, TEXAS, UTAH, VERMONT, VIRGINIA, WASHINGTON, WEST VIRGINIA AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE, IN SUPPORT OF RESPONDENT

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APPENDIX A

State Sales and Use Tax statutes regarding direct marketing:

Ariz. Rev. Stat. Ann. § 42-1401(5)(b) (1991)
Ark. Stat. Ann. § 26-53-121(b) (Supp. 1989)
Calif. Rev. & Tax Code Ann. § 6203(f) (West Supp. 1991)
Conn. Gen. Stat. §§ 12-407(12)(g) and (15)(e) (West Supp. 1990)
Fla. Stat. § 212.0596(2)(e) (Supp. 1990)
Ga. Code Ann. § 48-8-2(3)(H) (Supp. 1991)
Idaho Code § 63-3611(g) (1989)
Ill. Rev. Stat. ch. 120, para. 439.2(4) (Supp. 1990)
Iowa Code Ann. § 422.43(12)(b) (West 1990)
Kan. Stat. Ann. § 79-3702(h)(2) (Supp. 1990)
Ky. Rev. Stat. § 139.340(2)(c) (Michie/Bobbs-Merrill 1991)
La. Rev. Stat. Ann. § 47:301(4)(1) (West Supp. 1990)
Mass. Ann. Laws ch. 64H § 1 (Law. Co-op. 1991)
Minn. Stat. Ann. § 297A.21, subdiv. 4(a) (West Supp. 1991)
Miss. Code Ann. § 27-67-3(j) (Supp. 1989)
Mo. Ann. Stat. § 144.605(2)(a) (Vernon Supp. 1991)
Neb. Rev. Stat. § 77-2702(21)(e) (1990)
Nev. Rev. Stat. Ann. § 372.728(6) (1989)
N.C. Gen. Stat. § 105-164.8(b)(5) (1989)
N.D. Cent. Code § 57-40.2-01(6) (1991)
N.J. Stat. Ann. § 54:32-2(i)(1)(C) (West 1991)
N.M. Stat. § 7-9-10(A) (1990)
Ohio Rev. Code Ann. § 5741.01(H) and (3) (Anderson Supp. 1990)
Okla. Stat. Ann. tit. 68, § 1354.1.5 (West Supp. 1990)
Pa. Stat. Ann. tit. 72, § 7201(b)(3) (Purdon 1990)

R.I. Gen. Laws §§ 44-18-15(1)(E) and -23(c) (Supp. 1990)
S.C. Code Ann. § 12-36-70(2)(b) (Law. Co-op. Supp. 1990)
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Tex. Tax Code Ann. § 151.107(a)(5) (Vernon Supp. 1991)
Utah Code Ann. §§ 59-12-102(9)(c) and (17)(b) (Michie Supp. 1991)
Va. Code Ann. § 58.1-612(b)(6) (1991)
Vt. Stat. Ann. tit. 32, § 9701(9)(F) (Supp. 1990)
Wash. Rev. Code Ann. § 82.12.040 (Supp. 1991)
W. Va. Code § 11-15A-6a(a)(3) (Supp. 1991)

APPENDIX B

IN THE CHANCERY COURT
FOR THE STATE OF TENNESSEE
20TH JUDICIAL DISTRICT, DAVIDSON COUNTY

BLOOMINGDALE'S BY MAIL LTD.,	:	
Plaintiff,	:	
v.	:	
JOE B. HUDDLESTON, Commissioner of Revenue, and CHARLES W. BURSON, Attorney General of Tennessee,	:	No. 89-3017-II
Defendants.	:	

AFFIDAVIT OF HOLLEY H. ULBRICH, PH.D.

STATE OF SOUTH CAROLINA)
)
COUNTY OF PICKENS)

HOLLEY H. ULBRICH, Ph.D., after being duly sworn in accordance with the law, makes oath as follows:

1. I am a Professor of Economics at Clemson University in Clemson, South Carolina. I received my doctorate in economics from the University of Connecticut in 1968. My educational attainments, work experience, and descriptions of my published works are set forth in the attached true copy of my resume (Exhibit A), which I hereby incorporate as part of this sworn statement.

2. During 1984 and 1985, while on sabbatical from my professorship at Clemson University, I served as Senior Policy Analyst for the United States Advisory Commission on Intergovernmental Relations (ACIR), in Washington, D.C. The ACIR is a permanent national bipartisan body created by Congress to monitor and recommend improvements in the operation of the American federal system and the interrelationships of the federal, state, and local governments. The ACIR is composed of representatives of the executive and legislative branches of federal, state, and local governments, and of the public.

3. In my capacity as Senior Policy Analyst for the ACIR, I conducted research studies pertaining to the interstate mail order sales industry, and prepared the ACIR's report, *State and Local Taxation of Out-of-State Mail Order Sales*, which was published in April 1986, and the update of that report, *Estimates of Revenue Potential from State Taxation of Out-of-State Mail Order Sales*, published in September 1987.

4. In the course of my research on behalf of the ACIR and in the time since then, I have become knowledgeable of and have continued to monitor the nature, operations, and growth of the interstate mail order sales industry. Likewise, I am familiar with and knowledgeable of the scholarly literature, research studies, trade publications, official governmental studies and statistical compilations, and other resources, which are reasonably relied upon by experts in the fields of economics, public finance and taxation, in analyzing and forming educated conclusions regarding the interstate mail order sales industry, and the retail sales industry in general.

5. I have recently authored an unpublished paper, entitled "Changes in the Mail Order Industry Since 1967," which is attached to this affidavit as Exhibit B, and which I hereby incorporate as part of this sworn statement. That paper sets forth opinions and conclusions regarding the mail order industry which I have formed as a result of my research and within my expertise as an economist and a specialist in state and local public finance. The opinions and conclusions which I set forth in that paper are based upon sources, many of which are discussed or cited, which are among the sources of information reasonably relied upon by experts in the fields of economics, public finance and taxation in forming opinions or inferences regarding the interstate mail order sales industry.

/s/ Holley H. Ulbrich
HOLLEY H. ULBRICH, PH.D.

Sworn to and subscribed before me, this 10th day of January, 1991.

/s/ Ssybil C. Miller
NOTARY PUBLIC

My Commission expires:

7/20/98

EXHIBIT B

CHANGES IN THE MAIL ORDER INDUSTRY SINCE 1967

Holley H. Ulbrich
Alumni Professor of Economics
Clemson University
Clemson, SC

The author, a specialist in state and local public finance, holds a Ph.D. in economics from the University of Connecticut (1968). She served as a Senior Policy Analyst at the U.S. Advisory Commission on Intergovernmental Relations in Washington D.C. in 1984-85. In that capacity she authored the Commission's report, *State and Local Taxation of Interstate Mail Order Sales* (A-105), published in April 1986. Dr. Ulbrich is also a Senior Fellow at the Strom Thurmond Institute of Government and Public Affairs at Clemson University, working in applied public policy areas on issues of state and regional interest.

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INTRODUCTION

Since 1967, the mail order industry has grown and changed in significant ways – in size, in sales, in technology, and in marketing techniques. Many of the changes imply that the industry is fundamentally different in both size and method of operation from the mail order industry of 1967.

Industry Growth

Measuring both the size and the growth of the mail order industry is a difficult task, because mail order sales are scattered among a number of sellers, many of whom are only partially mail order firms. The lower limit on the

size of the industry is given by the Department of Commerce's *Census of Retail Trade*, conducted at five year intervals. These data only cover firms which are exclusively or primarily mail order, and thus fail to pick up sales or establishment data for other firms that sell by mail order in addition to other outlets. Far larger estimates come from industry sources, which identify all mail order sellers, not just those that fit the narrow Census definitions. The range of estimates of the size of the industry is thus from 1+ percent of retail sales to as much as 10 percent.

By any of these measures, the mail order industry has grown substantially since 1967, both absolutely and relative to retail trade in general. Over 7 billion catalogs are mailed each year to U.S. households, in addition to other methods of marketing that result in shipment of goods to customers without direct face-to-face contact between seller and buyer – the hallmark of mail order selling. More concrete indicators of growth in mail order sales can be found both from official government sources and from trade publications.

Government data: the Census

While the Census data clearly measure only a part of the industry, they do provide the best baseline measure of industry growth since 1967. These data are published in the Department of Commerce's *Census of Retail Trade* at five year intervals. The Standard Industrial Classification (SIC) code for mail order firms is 5961. The most recent retail trade census was conducted in 1987, showing 7,227 mail order firms in the category 5961 with over $20

billion in sales. Figure 1 uses Census data to show the growth of the number of firms in the mail order category. Figure 2 shows the growth in sales in mail order (5961) firms and in retail firms in general. Between 1967 and 1987, Census data record an increase in mail order sales from 1 percent to about 1.3 percent of total retail sales. During the same period, mail order sales grew at an average rate of just under 10% a year, compared to 8.4% for retail sales in general. Except for a drop in the number of mail order firms between 1982 and 1987, every Census measure shows that growth of the mail order business has outpaced the growth of the retail industry.[1]

Census data, however, captures only a small part of the mail order business. The firms reported in the *Census of Retail Trade* are only those for whom the primary retail activity is mail order. Increasingly, other retailers have a sideline in mail order which is not captured in the 5961 classification. Instead, sales of these firms are counted in their primary classification, which may be as a department store, a specialty shop, or some other classification. Estimates by the Small Business Administration and others suggest that the Census data for SIC 5961 are capturing substantially less than half of actual retail mail order sales.[2] In addition, a significant volume of mail order sales are to business firms rather than to retail customers. Depending on the item, the purchaser, and the state sales tax law, a substantial portion of these mail order sales to business firms may also consist of items subject to state and local sales and use taxes.

Trade Data: Industry Periodicals

Trade journals and publications describe an industry that has expanded at a rapid rate over the last twenty years and can be expected to continue to grow and thrive in the 1990s. The principal trade journal of the mail order industry is the magazine, *Direct Marketing*, although other trade publications also cover both mail order and direct marketing. According to *Direct Marketing*, some segments of the direct marketing business, particularly fund-raising, did experience a downturn in 1989, with the annual growth in the dollar volume dropping from the average of about 10% a year to only 5% between 1988 and 1989.[3] The slowdown, however, did not affect mail order, which experienced growth in the 6-10% range across the various segments of the industry. Mail order did an especially good Christmas business in 1989, with growth of 12% for the season over the previous year (compared to 5-6% for retail sales in general.)[4]

Direct Marketing's Arnold Fishman, a noted authority on the measurement of the mail order industry, estimated total mail order sales at $183 billion in 1989, of which consumer mail order purchases accounted for $87 billion. Of that amount, $54 billion was for products (generally subject to sales tax) and $33 billion was for services (less likely to be subject to sales taxes in most states). The remaining $96 billion consisted of business purchase ($50 billion) and charitable business, primarily solicitations ($46 billion).[5] The consumer figure of $87 billion would represent about 5% of estimated 1989 retail sales of $1.7 trillion. Even this figure understates the size of the mail order industry, because it does not include any mail order sales to business purchasers. Adding mail order sales to

business purchasers would increase the share of mail order in total final sales to about 8 percent. While a large share of consumer purchases by mail consists of items normally subject to sales taxes, the amount of business purchases that are subject to sales taxes varies greatly from state to state. In most states, however, at least part of these business purchases would be taxable.

Even these data understate the significance of the mail order industry for particular segments of the market. In some product lines, the market share is much higher. In 1983, twenty percent of magazine sales were by mail order, 9 percent of book sales, and 8 percent of apparel sales.[6] These sales represented significant competition for local retailers such as bookstores, newsstands, and department and specialty apparel shops.

Despite the documented presence of large, growing, and profitable mail order businesses such as Land's End, L.L. Bean, Fingerhut and Williams-Sonoma, mail order still has a Mom and Pop image. This image has helped to fuel resistance to requiring these firms to collect and remit sales taxes in all the states in which they have customers (subject, perhaps, to a sales threshold). In fact, there are numerous large mail order firms, including those that offer mail order services a sideline. The top 250 firms showed mail order sales ranging from 41 million (CUMIS Insurance Society) to over $3 billion (J.C. Penney). Seventy percent (175) of the top 250 mail order firms sell a significant amount of products or services that are generally subject to state and local sales taxes in most states with sales taxes.[7] Many of them do not meet the physical presence test and thus are able to avoid

collecting and remitting sales taxes to most of the states in which they do business.

Composition of Industry Growth

According to *Direct Marketing*, four of the top ten mail order firms are still traditional catalog sellers. These four are J.C. Penney; Sears, Roebuck; Spiegel (Otto Versand); and Fingerhut (Primerica). The first two firms, with annual mail order sales of more than $4.6 billion, have outlets in most states and collect sales taxes across the country. The other two have fewer outlets, collecting sales taxes in some states and not in others on a combined sales revenue of about $2.3 billion. Two others among the top ten (GEICO and U.S. Services Automobile Association) sell insurance, not generally subject to sales tax. Among the others are Time-Warner, Readers Digest, Newhouse, and Associated Communications, all in the publications/broadcast area.[8]

Two major home shopping networks fall in the second ten, QVC Network and Home Shopping Network – a method of selling unknown in 1967. Campeau, May Department Stores and Macy's are the top department store mail order firms, with combined mail order sales of more than $1.8 billion in 1989.[9] Most department stores only collect and remit sales taxes to states where they have retail outlets or other physical presence. Thus, there is considerable potential for additional sales and use tax collections among at least some of the major mail order sellers.

Reasons for Industry Growth

The fact that mail order sales have been growing more rapidly than retail sales in general reflects the fact that the industry enjoys some particular advantages in retailing in the 1980s and 1990s. While the purely mail order firm, unlike a traditional retailer, does not incur the cost of retail space and sales staff, there are other costs of operation, including catalogs and advertising expenditures, order clerks, warehouses, and shipping costs. Cost advantages, therefore, which have existing from the time of some of the earlier mail order firms in the 19th century, are inadequate to explain the recent surge in this part of the retail industry.

Some of the factors contributing to the last two decades of mail order growth were anticipated by Lester Wunderman in *Advertising Age* in 1967. Wunderman foresaw some changes in both the technology of marketing (telephone sales and the use of computers) and the demographics (working women in particular) that would contribute to the growth of mail order and its parent industry, direct marketing.[10] His predictions have been validated. Among the important non-technological contributing factors to growth in mail order sales in recent years have been changing demographics, specialty/niche marketing, and the decline of small town Main Street retailers. These changes have enabled mail order firms to compete more effectively against in-state retailers. In addition, for some customers the fact that they do not have to pay sales tax may be a factor in choosing mail order over an in-state retailer.

Demographic changes

In general, in-home shoppers are above average in socio-economic status (income, education, occupation, and social class.[11] Women are particularly likely to shop at home. The demographic changes in the U.S. population of the last few decades tend to favor the mail order segment of the retail industry. Many mail order sellers target older persons and two-earner couples because of the convenience and time-saving characteristics of shopping at home, and both of these groups have increased faster than the population as a whole.

The percentage of the population over age 65 has increased steadily from 9.6% in 1967 to 12.2% in 1987. As the baby boom ages, the population will become increasingly mature. Older customers are a relatively affluent group; in 1986, persons aged 50 and older accounted for 25% of the population but an estimated 75% of discretionary income.[12] In addition, those older persons who have limited mobility often find catalog shopping the most feasible alternative. Thus, this age group has become an important target for mail order firms.

A second group of customers of growing importance are the adults in two-earner families, particularly wives, who are likely to take on a large share of the shopping duties. In 1967, only 41% of adult women worked outside the home, but by 1989, 57% of adult women were in the labor force. Two-earner couples find that their limited time at home can be made to do double duty by combining shopping time with family time without leaving the home. At the same time, like the over-50 population, two-

earner families tend to be attractive customers because they have more discretionary income.

Specialty selling/niche marketing

A second source of industry growth has been the development of specialty catalogs and niche marketing, which allows a firm to access customers with particular characteristics all across the country. A firm specializing in doll house furniture or harmonica music, for example, would only be able to survive as a traditional retailer in a very large urban area. As a specialty catalog seller, however, such a firm can put together a sufficiently large national or even global clientele to make the business profitable.

Niches also mean identifying other kinds of target groups besides purchasers of highly specialized products. One of the growth areas in the last few years, for example, has been corporate gift-giving. Corporate representatives can select from a catalog by mail or telephone and have gifts delivered to customers or suppliers as a goodwill gesture.[13] This niche approach identifies customers by a particular kind or season of buying activity while offering a broad range of products to service that need. Mail order firms now have capability, using computer data banks, to target the retired, teenagers, college students, and working mothers. Computers allow sellers to put together specialized mailing lists as well as specialized catalogs for a range of products to meet a defined market segment's particular needs or tastes.

The decline of Main Street

One of the most visible trends in retail marketing across the nations since 1967 has been the displacement of small local retailers by shopping malls and large discount houses located in or near larger urban centers. Towns of less than 5,000 population are often limited to a gas station, a convenience store or two, a drug store, and a few other local retailers. Some even lack fast food outlets or basic grocery stores. Main Streets in smaller towns are full of empty storefronts, while shoppers congregate at malls and at the discount chains that build only in larger towns and cities.[14]

While the decline of Main Street has been a source of frustration to local citizens and community leaders, it has been a boon to the catalog seller. Shopping by phone at home with a quick turnaround is often more convenient for the small town resident than a long trip to the nearest major shopping area. Mail order was probably not a significant contributor to the decline of small town shopping, but it was well-poised to take advantage of the opportunity created by the loss of local shops. Ironically, mail order is returning to its rural routes while continuing to enjoy substantial sales to its new-found upscale urban and suburban clientele.

Marketing Technology and Industry Growth

Technological changes have revolutionized retail business in general, but the some of the innovations that took place in the last decade have particularly favored the growth of the mail order industry. In fact, the term mail order is an obsolete description of the industry, since

a relatively small share of orders are now being placed and/or delivered by mail. Telephone is the most common way to order, with FAX machines an up-and-coming alternative. While many deliveries still take place through the U.S. Postal Service, competitors such as United Parcel Service are also claiming a large share of the shipping.

Widespread use of telemarketing, television shopping programs, and toll-free 800 numbers make it possible for a retailer to be meaningfully present in all 50 states with a physical location in only one of them. Physical presence is a concept derived from a more traditional view of retail selling methods. In addition, other innovations such as FAX machines, widespread use of computers, and credit cards, all of which came into general use since 1967, have simplified shopping at home and favored mail order over traditional retailers.

Telemarketing

Telemarketing was almost unknown in 1967, but is a regular intrusion into the daily lives of most American households in the 1990s. While a large part of telemarketing is aimed at fund-raising for various charitable and political causes, there is a significant amount of direct selling that is undertaken in this way.

Rarely does the telemarketer operate from within the state where the call is placed. National phone banks manage the solicitations, so most telemarketers are never physically present in their customer's state.

Television Shopping

With the spread of cable television, home shopping programs have become increasingly popular. Although this method of shopping is undoubtedly remote from what the Supreme Court contemplated in 1967, it represents a growing share of the market. Like telemarketing, with television shopping the TV retailer rarely has a physical presence in the state wherein the customer resides.

The Home Shopping Network was a pioneer, and remains among the top twenty mail order firms, but this industry leader was overtaken in 1989 by the QVC Network. In that year QVC saw a 135 percent increase in sales, from $193 to $453 million. QVC alone claims a base of 4.5 million customers, with an average order of $40 to $50 and more than half of them repeat customers. Thus, the volume of sales through cable shopping networks is substantial and growing.[15] Still on the horizon is home videotex, which marries telephone fiber optics transmissions to the TV set to allow viewers to examine merchandise at home and place their orders.[16]

800 Numbers

The rapid expansion in the use of 800 numbers in the last decade has removed a major barrier to mail order. Customers who did not want to bother filling out an order form but also did not want to pay for a long-distance call now can call toll-free, often 24 hours a day, to place their orders. Again, use of the 800 number may not create any physical presence by the seller in the customer's state. Along with telemarketing and television shopping, the use of toll-free 800 numbers means that a

seller no longer needs physical proximity to customers in order to make a sale.

Fax Machines

The FAX machine appeared rather suddenly as an effective means of visual communication to replace both overnight mail delivery service and oral communication by telephone. A FAX machine is faster and cheaper than overnight delivery services and can transmit more complex visual messages than can be conveyed by oral communication.

Telemarketers have been quick to take advantage of the FAX machine as a way of transmitting promotional information, and many of them are equipped to accept orders by FAX. This technological boon to the mail order industry is still in its infancy and can be expected to see expanded use in the next few years.

Credit Cards

The widespread use of bank credit cards has taken place largely since the late 1960s. In 1987, about 40 percent of U.S households had at least one bank credit card,[17] and many have multiple cards. There may have been some growth in the number of households with credit cards in the last few years because of extensive promotional efforts by banks to expand the number of cardholders. While credit cards have been a boon to retailing generally, they have probably done more to encourage mail order. Credit cards greatly simplify the process of ordering by mail or telephone because the

customer no longer has to make all the computations, including shipping costs and sales taxes, and remit precisely the right sum. Credit cards also simplify the process of returning or exchanging merchandise by crediting the buyer's account. In some cases, the credit card number, as well as other relevant information, can be transmitted by punching the digits on a touchtone telephone.

Credit card issuers have been quick to take advantage of this captive market and use their billings as well as telemarketing to encourage cardholders to purchase merchandise and services by phone or mail. Typically a credit card bill will contain one or more offerings of merchandise as retailers team up with credit card issuers (or, in the case of Sears or Penney's, take advantage of their own credit program) to solicit additional sales.

Computers

The popularity of microcomputers both at home and in business has had particularly important implications for the mail order industry. In 1967, computers were still very large, clumsy, and expensive. By 1980 the first microcomputers were appearing in offices and even homes, and within a decade the U.S. had a large computer-literate population with access to computers at home, work, and school.

In mail order, the computer allows the person taking the order to offer the same personal touch as one's regular retail clerk. The computer will undoubtedly have the customer's name, address, telephone number, account number, and charge card information ready in response

to a call. It may also store sizes, color preferences, and other ordering history information that allows the order clerk to suggest related or substitute items. Although computers are criticized as impersonal, they are uniquely suited to adding a personalized touch to mail order purchases.

A second important role that computers have played in promoting mail order sales is the development of specialized mailing lists that allow a firm to select catalog recipients on the basis of a number of characteristics – age, family size, children, pets, hobbies, occupation, income levels, political preference, and other factors that may correlate highly with the firm's profile of most likely customers. The availability of such specialized computer lists has greatly facilitated the expansion of specialty mail order marketing in the last decade. Computers have contributed more than any other single factor to the growth of specialty mail order firms and specialized mailing lists targeting likely buyers.

Finally, the home computer has become a part of the shopping network for many households, who order through a modem from such data-based operators as Dow-Jones, Compu-Serve, or Compu-U-Card. In 1987, Compu-U-Card alone had 125,000 subscribers, of whom 75,000 used the service to shop by computer.[18]

Projections for the 1990s

Since 1967, the growth of mail order and its parent, direct marketing, has consistently exceeded the growth of retail sales. Existing firms have expanded, new and specialized firms have entered the market, and established

retailers have added mail order activity as a way to broaden their market base. Both past experience (using Census data) and the industry's own projections for the next decade are upbeat.

Fifty percent of Americans purchase by mail or phone at least once a year.[19] As the baby-boomers hit the 50 mark beginning in the mid-1990s, that share can be expected to increase. New technologies, such as the video airport shopping kiosk[20], can be expected to continue to emerge, as well as expanded use of the new technologies of the 1980s. Videotex in the home is still in its infancy in the U.S., although it has caught on in France with some 5 million subscribers to the multi-function Minitel service. In this country, home videotex should be a significant factor in expanding in-home sales by the end of the decade.[21] These technological changes have made retailing far more of a national industry and less of a localized industry than it has been in the past. Changes in technology in particular suggest that what constitutes meaningful presence in the state in 1990 is very different from what it was in 1967.

With the continuing spread of computers, FAX machines, niche marketing, cable shopping networks, 800 numbers, credit cards, and other innovations favorable to the mail order industry, as well as growth in those population segments most interested in mail order, it is reasonable to expect mail order sales will continue to experience (if not increase) the annual growth rate of dollar volume of sales of about 10% a year that was the average over the last two decades. New technology means that the mail order firm increasingly represents a very direct competitor to the local retailer. If mail order continues to make

inroads on the total retail market, the potential sales tax revenue from presently untaxed mail order sales will represent an increasingly significant revenue loss to state and local governments.

FOOTNOTES

[1] U.S. Department of Commerce, *Census of Retail Trade*, 1963, 1967, 1972, 1977, 1982, 1987.

[2] U.S. Advisory Commission on Intergovernmental Relations, *State and Local Taxation of Out-of-State Mail Order Sales* (A-105), April 1986, p.3.

[3] Fishman, Arnold. "1989 Mail Order Overview," *Direct Marketing*, September 1990, p. 41-44.

[4] Halverson, Guy. "Mail Order Retailers Poised for Growth," *The Christian Science Monitor*, March 26, 1990, p. 9.

[5] Fishman, Arnold. *Guide to Mail Order Sales 1989*. Hoke Publications, Deerfield, IL. An abbreviated summary of the findings in this annual publication is given in "Mail Order Top 250," *Direct Marketing*. July 1990, p. 27-45.

[6] Fishman, Arnold. *Guide to Mail Order Sales 1983*. Hoke Publications, Deerfield, IL.

[7] *Ibid.*

[8] *Ibid.*

[9] *Ibid.*

[10] Wunderman, Lester. "Mail Order – the Coming Revolution in Marketing," *Advertising Age*. July 24, 1967, p. 67-70.

[11] Gillett, Peter L. "In-Home Shoppers – an Overview," *Journal of Marketing*. October 1976, p. 81-84.

[12] Halverson, *op. cit.*

[13] *Ibid.*

[14] Rawn, Cynthia Dunn. "WalMart vs. Main Street," *American Demographics*, June 1990, p. 58-9, offers an illustration of the decline of Main Street, looking at the impact of discounters on small town shops. A more general view of the problems of

traditional small town business districts is provided in "Malaise on Main Street," *Wall Street Journal*, August 2, 1990, p. 1

[15] "Mail Order Top 250" (*op. cit.*).

[16] Cutler, Blayne. "The Fifth Medium," *American Demographics*, June 1990, p. 25-30.

[17] "Bankcards at the crossroads," *ABA Banking Journal*, September 1987, p. 66-79.

[18] Barmash, Isadore. "Armchair buying is a growth industry." *the New York Times*, February 19, 1987.

[19] Halverson, *op. cit.*

[20] Haber, Holly. "Upscale shopping kiosks go online in U.S. airports." *Women's Wear Daily*, November 21, 1988, p. 6.

[21] Cutler, *op. cit.*

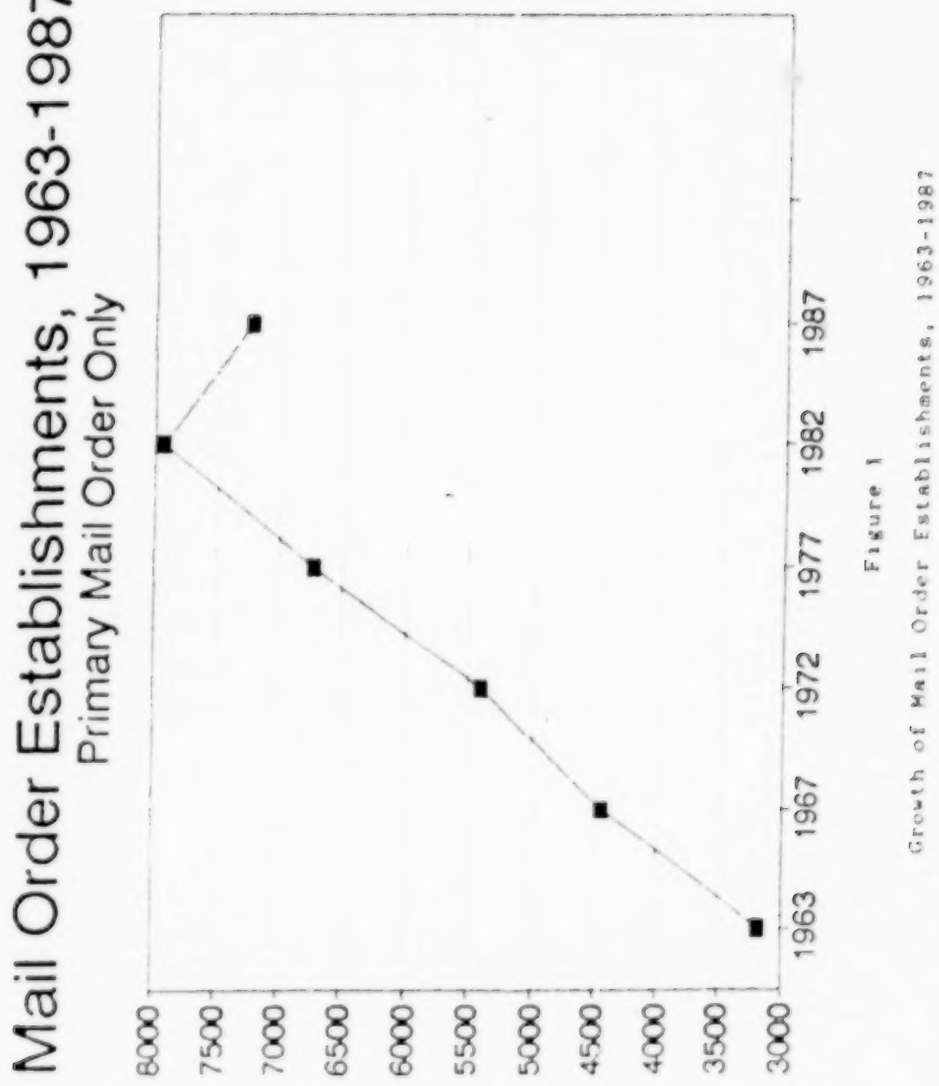


Figure 1

Growth of Mail Order Establishments, 1963-1987

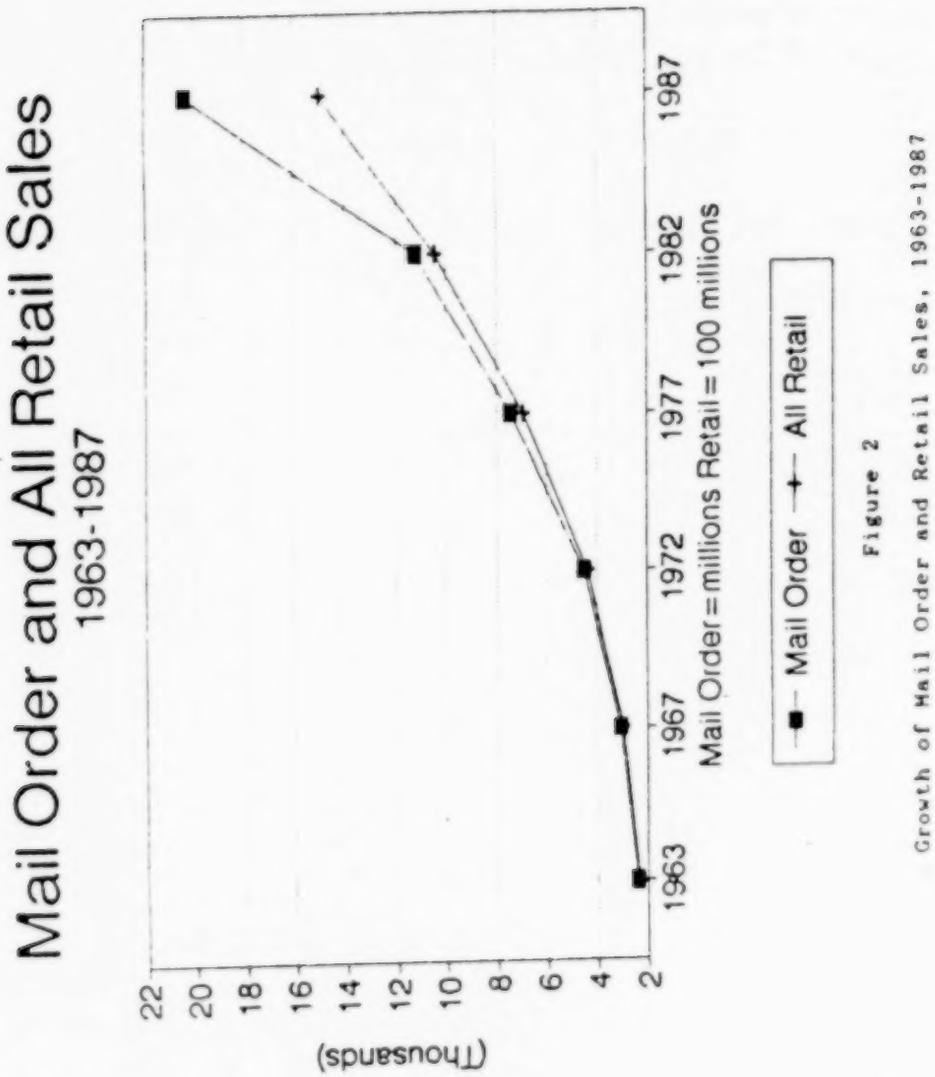


Figure 2

Growth of Mail Order and Retail Sales, 1963-1987

APPENDIX C

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

DIRECT MARKETING ASSOCIATION, INC.,	)	No. CIV S-88-1067 MLS-EM
PLAINTIFF,	)	
vs.	)	STIPULATIONS
WILLIAM M. BENNETT, et al.	)	
DEFENDANTS.[1]	)	

[1] This case, an injunction action, was filed in 1988 by the Direct Marketing Association (DMA), a trade association of mail order retailers. It sought to thwart California's enforcement of CALIF. REV. & TAX CODE ANN. §6203(f) as to out-of-state mail order companies. In order to avoid the jurisdictional prohibition of the Eleventh Amendment, DMA complained against individuals, present and former elected members and employees of the California State Board of Equalization. In order to avoid the Tax Injunction Act, DMA alleged that such retailers, as use tax collectors only, had no access to California's sufficient and longstanding post-payment refund remedies. The district court granted the Board's motion to dismiss, citing the Tax Injunction Act and federal and state appellate decisions in which the California remedies were made available to use tax collectors. The Ninth Circuit reversed (916 F.2d 1454), inexplicably determining that California's remedies are "uncertain" for use tax collectors, and consequently holding that the Tax Injunction Act did not bar federal jurisdiction. This Court declined to issue a writ of certiorari. (Docket No. 90-1400). The district court subsequently determined that DMA had standing and ruled irrelevant the post-complaint assessment actions by the Board, through which California's remedies became patently certain as to at least 110 mail order retailers. The district court then granted summary judgment for DMA, nonetheless observing

(Continued on following page)

STIPULATIONS

The Plaintiff, Direct Marketing Association, and the Defendants, William M. Bennett, et al., hereby agree to the following stipulated facts. The factual submissions set forth herein are not an admission of relevancy of any of the stipulated facts, do not prevent the parties from arguing legal conclusions and do not constitute a waiver by any party of the facts set forth and/or legal positions asserted in any previously filed pleading or motion.

1. Plaintiff, Direct Marketing Association, Inc. ("DMA"), which filed the instant action on August 19, 1988, is a trade association whose members include entities, with places of business solely outside California (hereinafter "Direct Marketers"), whose business activities are described below and which are engaged in the nationwide direct-to-the consumer mail advertising and marketing of products through orders for products accepted by mail or telephone and through shipments of products to customers by common carriers and/or the United States Postal Service (hereinafter "USPS").

2. Defendants are or were elected members or employees of the California State Board of Equalization (hereinafter "SBE"). SBE is an agency of the State of California charged with the administration of the sales and use tax laws of the State of California. Said laws

(Continued from previous page)

that the Board had presented a number of meritorious arguments why *National Bellas Hess* should be reversed, modified or overruled. At present the case is again before the Ninth Circuit, on appeal by the Board.

include section 6203 of the California Revenue and Taxation Code (hereinafter "section 6203").

3. The State of California enacted amendments to section 6203, effective January 1, 1988 and March 30, 1988. As of August 19, 1988, and at present, section 6203 provides:

> [E]very retailer engaged in business in this state and making sales of tangible personal property for shortage, use, or other consumption in this state, . . . shall, at the time of making the sales or, if the storage, use, or other consumption of the tangible personal property is not then taxable hereunder, at the time the storage, use, or other consumption becomes taxable, collect the tax from the purchaser and give to the purchaser a receipt therefor in the manner and form prescribed by the board.

"Retailer engaged in business in this state" as used in this and the preceding section means and includes any of the following:

(a) Any retailer maintaining, occupying, or using, permanently or temporarily, directly or indirectly, or through a subsidiary, or agent, by whatever name called, an office, place of distribution, sales or sample room or place, warehouse or storage place, or other place of business.

(b) Any retailer having any representative, agent, salesman, canvasser, or solicitor operating in this state under the authority of the retailer or its subsidiary for the purpose of selling, delivering, or the taking of orders for any tangible personal property.

(c) As respects a lease, any retailer deriving rentals from a lease of tangible personal property situated in this state.

(d) Any retailer soliciting orders for tangible personal property by means of a telecommunication or television shopping system (which utilizes toll free numbers) which is intended by the retailer to be broadcast by cable television or other means of broadcasting, to consumers located in this state.

(e) Any retailer who, pursuant to a contract with a broadcaster or publisher located in this state, solicits orders for tangible personal property by means of advertising which is disseminated primarily to consumers located in this state and only secondarily to bordering jurisdictions.

(f) Any retailer soliciting orders for tangible personal property by mail if the solicitations are substantial and recurring and if the retailer benefits from any banking, financing, debt collection, telecommunication, or marketing activities occurring in this state or benefits from the location in this state of authorized installation, servicing, or repair facilities.

(g) Any retailer owned or controlled by the same interests which own or control any retailer engaged in business in the same or a similar line of business in this state.

(h) Any retailer having a franchisee or licensee operating under its trade name if the franchisee or licensee is required to collect the tax under this section.

(i) Any retailer who, pursuant to a contract with a cable television operator located in

this state, solicits orders for tangible personal property by means of advertising which is transmitted or distributed over a cable television system in this state.

(j) Notwithstanding Section 7262, a retailer specified in subdivision (d), (e), (f), (g), (h), or (i) above, and not specified in subdivision (a), (b), or (c) above, is a "retailer engaged in business in this state" for the purposes of this part and Part 1.5 (commencing with Section 7200) only.

4. Direct Marketers maintain no offices, outlets stores, warehouses or other facilities, stock of goods, real property or employees in California.

5. Direct Marketers' employees do not enter California to perform any business on behalf of Direct Marketers.

6. Direct Marketers have no agents, independent contractors or representatives of any kind in California soliciting sales on their behalf.

7. Direct Marketers do not maintain bank accounts of any type in California or contractual relationships with any bank or other financial institutions located in California.

8. Direct Marketers do not ship products to California customers from any location in California. Direct Marketers ship ordered products from their facilities, which are not located in California, to their customers nationwide by USPS and by United Parcel Service, Federal Express and other common carriers.

9. Direct Marketers send catalog and/or mailings to intended recipients nationwide, including those with California address, by USPS from locations outside California. The printing and pre-printing work for such catalogs and mailings is accomplished outside California. Catalogs are sent to persons listed on Direct Marketers' mailing lists, which contain the names of customers of Direct Marketers and names acquired from companies located outside of California.

10. Customers ordering products from Direct Marketers either 1) mail their orders to Direct Marketers through the United States mail, or 2) place their orders by telephoning Direct Marketers' facilities using the "800" telephone numbers of Direct Marketers. Direct Marketers have no local telephone listings in California.

11. Customers ordering products by mail from Direct Marketers use order forms accompanying the catalogs or mailings. Payments for mailed-in orders are either by check, with funds payable to Direct Marketers, or by charge to customers' credit cards. The mail-in order forms request, for charge orders, that customers specify the type of credit card (for example, VISA, MasterCard, Discover or American Express), the card account (or "BIN") number, and the card expiration date.

12. Telephone orders are received by Direct Marketers at their non-California facilities through the customers' use of an "800" telephone number provided to the Direct Marketers by local telephone companies, located outside California, and AT&T or another long distance telephone carrier. Direct Marketers pay the cost for calls placed on their "800" telephone numbers. The

"800" telephone numbers of Direct Marketers apply to calls from customers throughout the United States, including telephone calls originating in California, and for some entities are accessible by customers 24 hours a day. In placing telephone orders customers provide Direct Marketers with a description of the merchandise ordered, as well as the type of credit card (for example, VISA, MasterCard, Discover or American Express), the card account (or "BIN") number and the credit card expiration date and the customer's telephone number.

13. Direct Marketers do not know the name or location of the bank which issued a credit card used to make a purchase.

14. Direct Marketers provide warranties of customer satisfaction such that, if at any time the customer returns to a Direct Marketer merchandise which was ordered from and shipped by that Direct Marketer, the customer will receive a replacement or refund. If the merchandise is lost by the customer or lost in transit when shipped by the customer to the Direct Marketer, the customer will not be entitled to a refund or replacement.

15. Over one-half of the sales by Direct Marketers are accomplished through the use of credit cards (for example, VISA, MasterCard, Discover and American Express). A substantial portion of the credit card sales of Direct Marketers to California customers are charged to the customers' VISA and MasterCard credit cards issued by California financial institutions.

16. Direct Marketers' catalog and mail solicitations of, and sales to, California customers are substantial and recurring. However, Direct Marketers do not regularly

advise DMA of their sales volumes or the number of separate sales or the volume or page numbers of their catalog or mail solicitations or the period following such solicitations during which offered products remain available for purchase.

17. Subsequent to January 1, 1988, SBE notified Direct Marketers of the requirement, pursuant to section 6203(f), that Direct Marketers register with SBE, and collect and remit use taxes for sales to California customers, on the basis that 1) Direct Marketers' catalog and mail solicitations of, and sales to, California customers are substantial and recurring, and 2) Direct Marketers derive a benefit from banking activities occurring in California by accepting for purchases by California customers credit cards issued by California financial institutions. SBE has also informed Direct Marketers that enforcement actions, including the issuance of determinations to individual entities, would be taken if Direct Marketers did not register, collect and remit use taxes. SBE has taken enforcement actions including the issuance of determinations to individual Direct Marketers. SBE is unaware of which of the Direct Marketers who received such notifications are members of DMA.

18. For VISA and MasterCard credit card orders, Direct Marketers do not ship ordered products unless an approval code for the charge is communicated to Direct Marketers by Direct Marketers' banks, which subsequently purchase approved VISA and MasterCard transactions ("acquiring banks"), or by independent companies called processors, through an electronic communication from acquiring banks or processors to the direct marketers. Direct

Marketers' acquiring banks and processors are located outside of California.

19. If Direct Marketers request electronic approval from processors instead of from acquiring banks, and if such approval is granted or denied, acquiring banks are not involved in this aspect of the authorization process. If acquiring banks provide authorization codes to Direct Marketers approving or denying the transaction, the acquiring banks do not record such information.

20. Pursuant to agreements between Direct Marketers and the acquiring banks, the banks provide the Direct Marketers with electronic equipment enabling Direct Marketers to communicate with the acquiring banks or processors to ascertain whether or not approval is granted for purchases charged on customers' VISA or MasterCard credit cards. The acquiring banks or processors, in turn, communicate with Direct Marketers, informing them if the charge to VISA or MasterCard was approved or disapproved or whether contact with a call authorization center is needed for approval. A call authorization center is provided for the benefit of acquiring banks by another entity with which the acquiring banks contract. Call authorization centers are located outside of California. Direct Marketers which contact call authorization centers do so by telephone. Call authorization centers request information from issuing banks, defined below, regarding approval of a purchase. Call authorization centers subsequently communicate the information obtained from the issuing banks to the direct marketers. Call authorization centers may request specific information from Direct Marketers such as the type of products

to be purchased. Call authorization centers may then transmit such information to issuing banks.

21. Direct Marketers' banks (the acquiring banks) are members of VISA and MasterCard, either directly or through an association of financial institutions.

22. Direct Marketers have no contractual relationship with VISA or MasterCard or their parent organizations, VISA, International and MasterCard, International.

23. The electronic equipment provided to Direct Marketers by their banks, which allow Direct Marketers to communicate with their banks or processors, require Direct Marketers to input the credit card account number, expiration date, and the amount of the intended purchase in order to determine whether the purchase is approved. If an approval code is obtained, this information is recorded by Direct Marketers on their order forms.

24. For each approved VISA or MasterCard credit card purchase, Direct Marketers generate a separate document, or computer entry. Each business day, Direct Marketers compile these separate documents or entries and submit them to the acquiring banks. Pursuant to their agreement with Direct Marketers, acquiring banks purchase these approved VISA and MasterCard transactions from Direct Marketers at a discount rate negotiated between the bank and the Direct Marketer. The discount fee, in part, is determined by acquiring banks' overhead costs, including the interchange fees charged by VISA and MasterCard, as defined below, and other overhead costs such as supplies, stationery, salaries, building maintenance and computer processing for the banks as a whole.

25. Under the terms of Direct Marketers' agreements with their banks, Direct Marketers are entitled to, and in fact receive, payment on all approved VISA and MasterCard transactions delivered to acquiring banks. In other words, Direct Marketers' banks are obligated to purchase all approved VISA and MasterCard transactions submitted by Direct Marketers. There is no risk to Direct Marketers if their banks do not obtain collection. Direct Marketers have no involvement with respect to VISA and MasterCard charges other than (i) electronically communicating with acquiring banks or processors to obtain approval for these charges and (ii) submitting approved orders to acquiring banks for purchase by these banks. If a credit card holder asserts to the issuing bank that his or her credit card was fraudulently used, the issuing bank will charge the acquiring bank for the amount of the transaction. The acquiring bank will then charge the Direct Marketer for the amount of the purchase.

26. VISA, U.S.A., and MasterCard, International, are separate entities which are comprised of financial institutions or financial institution association members. These entities may be (i) licensed to use the VISA or MasterCard mark; (ii) licensed to issue VISA or MasterCard cards, *i.e.*, act as issuing banks; or (iii) authorized to purchase VISA and MasterCard transactions from merchants, *i.e.*, act as acquiring banks.

27. Acquiring banks and processors enter into agreements with Direct Marketers which solely govern the relationship between the acquiring bank or processor and Direct Marketer regarding the Direct Marketer's acceptance of payment by VISA or MasterCard from its customers.

28. In 1990, VISA had approximately 110,000,000 accounts in the United States. In 1988, there were approximately 55,000,000 MasterCard accounts. In 1990, approximately 500 California financial institutions were licensed to issue VISA cards. In 1990, 713 California financial institutions were licensed to issue MasterCard cards.

29. VISA and MasterCard card-issuing banks set the level of credit which their customers can charge to their cards. The card-issuing banks determine the fee, if any, to charge their cardholders, which fee is not shared with VISA or MasterCard or any other members of VISA or MasterCard.

30. Both VISA and MasterCard provide acquiring banks with an option of having VISA and MasterCard communicate with issuing banks. Acquiring banks may decline to use VISA and MasterCard for such communications. Direct Marketers who request an approval code from their acquiring bank or from processors have no involvement in any of the communications between the acquiring banks or processors, on the one hand, and the issuing banks, on the other hand. When acquiring banks or processors receive the authorization information from the issuing banks, that information is, in turn, communicated by the acquiring banks or processors to the Direct Marketers.

31. Whether approval information is requested by acquiring banks or processors, such entities first directly seek this information from the issuing banks and then give the issuing banks' response (for example, approving the transaction) to the acquiring banks or processors,

which, in turn, give the information to the Direct Marketers. If the issuing bank cannot be contacted (*e.g.*, its computers are "down"), VISA or MasterCard may approve or deny the transaction based upon criteria and information provided by the issuing bank and communicate this information to the acquiring bank or processor, which, in turn, gives it to the Direct Marketers. In the latter case, the issuing bank is not involved in the communication between VISA or MasterCard and the acquiring bank or the processor.

32. MasterCard and Visa require issuing banks to provide 24-hour approval capability whether or not the approval for a particular transaction comes from VISA or MasterCard, the issuing bank, or an independent processor.

33. The VISA and MasterCard by-laws state that if an approval code given by the issuing bank was validly communicated to the acquiring bank or processor (and, in turn, communicated to Direct Marketers) regarding a VISA or MasterCard transaction which the acquiring bank has purchased, the acquiring bank will be credited for the transactions it has purchased with the issuing institution bearing the risk of collecting on the debt from its customers, the credit card holder.

34. VISA and MasterCard also provide acquiring and issuing banks the option to go through VISA or MasterCard, via electronic communications, for settlement functions. Direct Marketers have no involvement in this function. Acquiring banks and issuing banks may, alternatively, decide not to involve VISA or MasterCard

for this function. Approximately 35% to 45% of VISA transactions are not processed through VISA.

35. The VISA interchange fee is intended to balance the costs in the payment stream. The VISA interchange fee is set by the Board of Directors of VISA based upon a statistical analysis of costs in the industry. The net flow of interchange fees is to the issuing institution because there are more costs of this "side" of the transaction. One of the bigger costs for those VISA issuing members who offer customers a "grace period" before charging interest on outstanding balances involves "float," the cost of money to the issuing bank before the account holder is billed by the issuing bank for the transaction and the issuing bank receives payment. The VISA interchange fee is paid by the acquiring bank to the issuing institution and is intended to compensate the issuing institution for costs with respect to the VISA system. The setting of the interchange fee is unrelated to the purchase price for credit card transactions paid by the acquiring bank to the Direct Marketer.

36. In setting the standardized interchange fees, MasterCard's board of directors considers industry-wide factors including the issuing banks' costs of funds, credit losses, and fraud losses. The MasterCard interchange fee is intended to compensate the issuing institution for costs with respect to the MasterCard system. The setting of the interchange fee is unrelated to the purchase price for credit card transactions paid by the acquiring bank to the merchant.

37. In undertaking the optional settlement function, VISA and MasterCard are transmitted electronic files

from acquiring banks reflecting the credit card transactions purchased from merchants by the acquiring banks. VISA and MasterCard determine which issuing institutions are involved in each of the transactions by translating a confidential code incorporated into the credit card BIN number. VISA and MasterCard then electronically advise the issuing institution or an intermediary processor of the transactions so that they may be posted to the proper card account at the issuing bank. VISA and MasterCard then calculate the fees involved and advise their settlement banks to appropriately credit or debit each banking institution or intermediary processor. VISA and MasterCard have no means of identifying the particular merchant involved in a given transaction.

38. If an issuing bank has failed or cannot settle on a particular day, VISA or MasterCard will "cover" settlement (*i.e.*, make payment to the acquiring bank) so that there is no risk to the acquiring bank which has purchased an otherwise valid VISA or MasterCard transaction. If the failed bank is a member of an entity which is an association member of MasterCard, MasterCard will look to the association to "cover" the settlement.

39. Issuing banks are responsible for maintaining their own accounts with their customers (the cardholders). Issuing banks are free to establish the terms of their agreements with their customers, including credit limits, grace periods, and annual percentage rates to be applied to outstanding balances. Issuing banks post purchases and bill cardholders pursuant to these agreements.

40. In collecting upon delinquent VISA and/or MasterCard accounts, an issuing bank has available to it

statement "duns," telephone calls to accounts holders, referral to collection agencies, and lawsuit against its cardholders.

41. VISA provides some acquiring banks and issuing banks, or their independent processors, with electronic equipment known as "access points." VISA also provides some banks with software which permits the banks to use "access points" to communicate electronically with VISA should the banks decide to communicate with VISA regarding approval and/or settlement.

42. MasterCard requires that acquiring and issuing banks maintain computers which have a standard telecommunications hook-up so that the banks can communicate electronically with MasterCard.

43. Neither VISA nor MasterCard specify the type of hardware or software that Direct Marketers maintain to obtain approval for VISA or MasterCard transactions.

44. VISA, U.S.A. is a member of VISA International. Both entities have a principal place of business in California.

45. MasterCard's principal place of business is in New York, New York. MasterCard has two sales offices and a computer center located in California.

DATED: May 24, 1991

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APPENDIX D

IN THE CHANCERY COURT
FOR THE STATE OF TENNESSEE
20TH JUDICIAL DISTRICT, DAVIDSON COUNTY

BLOOMINGDALE'S BY MAIL LTD., Plaintiff,	:	
v.	:	
JOE B. HUDDLESTON, Commissioner of Revenue, and CHARLES W. BURSON, Attorney General of Tennessee, Defendants.	:	No. 89-3017-II

AFFIDAVIT OF RAY WESTPHAL

STATE OF PENNSYLVANIA)
)
COUNTY OF CHESTER)

RAY WESTPHAL, after being duly sworn in accordance with the law, makes oath as follows:

1. I am the President of Vertex, Inc., located in Berwyn, Pennsylvania. I have personal knowledge of the facts set forth below.

2. I have been the President of Vertex, Inc., since 1978 and was employed by its predecessor corporation from 1974 to 1978. My prior employment includes computer consulting work with the accounting firm Peat Marwick from 1967 to 1971, and with the Educational

Testing Service, of Princeton, New Jersey, from 1961 to 1967. In the course of such employment, I have accumulated 29 years of experience in developing and adapting computer systems to meet the varied needs of many kinds of businesses.

3. I am the author of an article, entitled "The Computer's Role in Simplifying Compliance with State and Local Taxation," which was published in the May 1986 edition of the Vanderbilt Law Review.

4. As President of Vertex, Inc., I have developed and overseen the development of a computerized sales tax compliance system which is specially suited for use by companies whose business reaches into a multitude of state and local taxing jurisdictions throughout the United States. Vertex, Inc., is the nation's leading supplier of computer systems designed to handle the administrative and accounting tasks faced by a company in complying with state and local sales and use taxes in multiple taxing jurisdictions. The Vertex computerized sales tax compliance system consists of three main elements:

(a) The Data Module contains complete state and local sales and use tax rate information for every taxing jurisdiction in the United States. This information is updated on a regular, monthly basis, through our constant communications with taxing jurisdictions nationwide.

(b) The Calculation Module integrates the state and local tax rate information directly into the user's own computerized billing systems, calculates the appropriate tax on each transaction, and generates management reports. At the user's choice, and depending on its needs,

transactions are identified to specific taxing jurisdictions by zip code, zip code plus city name, FIPS (Federal Information Processing Standard), or by our proprietary GeoCode system.

(c) The Returns Module uses the information from the Calculation Module to generate automatically state and local tax returns, on appropriate forms, for each taxing jurisdiction.

5. The Vertex sales tax compliance system works with virtually any major mainframe computer or minicomputer, and can also run on virtually any IBM personal computer or compatible equipment, with no special configurations needed. Any company which uses computers to handle its billings, mailing lists, or similar functions, probably already has the hardware necessary to make full use of the Vertex system.

6. The system described above enables companies to eliminate the burdensome, labor-intensive process of calculating taxes and preparing tax returns manually, and thus to minimize both the costs of compliance and the expensive human errors (and the consequent penalties, late-filing fees, and interest charges) which can occur when taxes are handled manually.

7. The computerized Vertex sales tax compliance system is currently in place with and used by approximately 1000 corporations. In my experience with dealing with such customers, I have found that typically, depending on the nature and the needs of the business, at least half of the man-hours per month which were expended on sales tax compliance before computerized systems were used, can be eliminated by use of the Vertex system.

Thus, a typical company owing sales tax to numerous state and local taxing jurisdictions can, by using the computerized Vertex system, cut the man-hours, and thus other costs, associated with tax compliance by at least 50%.

8. The basic Vertex sales tax compliance system, as described above, is priced at about $12,700.00 for initial installation, and about $10,000.00 per year thereafter for maintenance, updates, and related services. An extra charge is made if the customer chooses to take advantage of our proprietary GeoCode system. Vertex, Inc., also markets other products and services, for which separate charges are made.

9. More information about the Vertex sales tax compliance system is provided in our brochure, a true copy of which is attached here as Exhibit A.

10. The Vertex computerized system has been available on the market since 1975, and of course has been improved and updated since that time.

11. Although Vertex, Inc., is the leading supplier in the United States of systems such as that described above, there are other companies which also market computer programs for sales tax compliance.

12. Neither I nor Vertex, Inc., take any position regarding the interpretation, correctness, or applicability of the decision in the *National Bellas Hess* case.

/s/ Ray Westphal
RAY WESTPHAL

Sworn to and subscribed before me, this 8th day of January, 1991.

/s/ Helen Roth
NOTARY PUBLIC

My Commission expires: [seal]
11/15/93

Exhibit A

[Text of the Vertex brochure, omitting illustrations]

VERTEX™

SalesTax™
Compliance
System

"It takes the worry out of sales tax compliance – from the moment we write an order right through filing returns."

System

If you do business, now you've got a better way to handle sales tax compliance.

It's SalesTax™, the remarkable system for PCs, mainframes, and minicomputers that handles sales tax compliance from calculation and billing right through returns filing – eliminating labor-intensive, error-prone manual calculation and returns preparation.

No matter how many taxing jurisdictions you operate or sell in, SalesTax™ makes

- Looking up sales and use tax rates,
- Calculating taxes,
- Interfacing with your billing system,
- Preparing tax returns, and
- Generating management reports

fast and easy.

And it does all this at a fraction of the *true* cost of manual systems.

Three modules/One system

SalesTax's exceptional speed, power, and ease of use come from its modular design.

The SalesTax *Data Module* contains complete state and local rate information, updated monthly,

The *Calculation Module* integrates this data directly into your computerized billing program, calculates taxes automatically, and produces management reports.

And the *Returns Module* uses the data from the Calculation Module to produce state and local tax returns automatically.

ALL U.S. AND CANADIAN SALES AND USE TAX RATES

The SalesTax Data Module – available on magnetic tape or PC-system diskettes – contains data for over 50,000 locations in the United States, its Trusts and Possessions, and Canada.

All current U.S. taxing entities are included in the SalesTax file. In addition – because new taxes can be imposed at any time – *all* states and counties are on file, as well as all cities with populations over 250.

Vertex stays in constant contact with taxing states, and self-administered localities, to stay abreast of sales/use tax rate changes, and updates are issued monthly.

The Data Module contains both the current and the previous sales, use, and rental tax rates – obtained directly from the taxing jurisdictions. The effective date of each current rate is provided and is updated with each rate change.

TAX CALCULATION – QUICK, ACCURATE, AUTOMATIC

The SalesTax Calculation Module is designed to interface effortlessly with *any* commercial or custom developed billing software. Based on the parameters given by your billing program. SalesTax determines

- If the transaction is interstate or intrastate.
- The tax rates to be applied.

- The taxability of freight, parts, labor, expense, and federal excise tax*, and
- Maximum tax base and excess amounts, if applicable.

Your billing program may override any SalesTax parameter, and may supply additional information, such as exemption information.

SalesTax then

- Retrieves the appropriate tax rates.
- Calculates tax amounts.
- Returns these amounts to your billing program, and
- Stores the information for management reports and returns preparation.

And because the state, county, and city rate data are all carried *separately* in the Data Module, SalesTax can calculate these three levels individually – a necessity for reporting tax collections to states that require detailed breakdowns of local taxes.

Takes exceptions in stride

State and local tax laws are full of exceptions, and SalesTax is designed to accommodate *all* of them, including

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* The taxibility of freight, parts, labor, expenses and federal excise tax are determined according to the general rules applied by the states.

- **Tax rate overrides and partial rates**

In several states, city taxes may override a county tax; or a city will pick up a part of the county rate; or a city or county part of the state rate. SalesTax flags these overrides or partial rates in the city record to ensure correct calculation of taxes for that city.

- **Maximum rates on dollar amounts**

In some states the sales tax law includes provisions for maximum tax amounts for cities and counties. Base dollar amounts – for single items or single sales – may be taxed at the standard rate, and amounts in excess of the base at another. SalesTax carries the base amount, maximum tax, and excess rate in the county and city records, where applicable, and applies this information when calculating county and city taxes.

- **Locally administered taxes**

SalesTax automatically identifies cities and counties that are locally administered and directs the filing of returns accordingly.

- **Other special conditions**

Some companies – because of the type of business they're in, the products they sell, the type of customers they have, or how they do business – require rates other than the general rates carried in the SalesTax Data Module. No problem. SalesTax will help you create and maintain your own custom tax exception files.

TAX FILING – CLOSING THE LOOP

SalesTax's Returns Module completes the sales tax cycle by preparing state and local returns with the same speed and efficiency as the rest of the SalesTax system – saving time and effort and reducing your audit exposure.

Simple as 1-2-3®

The Returns Module is a full-featured application built around Lotus' 1-2-3, the world's most widely used business productivity software.

So, if you're one of the tens of thousands of businesses that use Lotus 1-2-3, you already know most of what you need to know to start using the Returns Module right away.

Easy to learn . . . and use

The Returns Module makes tax filing fast and easy.

Data is "downloaded" directly from the SalesTax Calculation Module. Then your PC does the rest, calculating, formatting, and printing your returns – one at a time or as a batch.

Clear, organized menus and Help screens, in plain English, guide you through the entire process.

Signature-ready returns

The SalesTax Returns Module will prepare all the forms you need to file – including sales and use tax

returns, return worksheets, schedules, and consolidated report forms for both state and local jurisdictions.

In most states, these forms are approved for submission just as they come from your printer. Even where they're not, their layout identically matches each jurisdiction's return format, so it's simple to transfer or attach information to official return forms.

Finally, SalesTax generates a check request, referencing your internal general ledger account number.

More accurate, timely filing

SalesTax eliminates time-consuming manual return preparation, and its attendant human-factor errors.

With SalesTax, your returns will be prepared on time. And your exposure to late charges and state audits – maybe even your need for staff – will be reduced.

Even if you *are* audited, SalesTax gives you a clear, easy-to-understand audit trail of detailed management reports for demonstrating compliance.

Runs on the most popular hardware

Best of all, the SalesTax Returns Module runs on virtually any IBM® PC or compatible with 640K RAM – with no special configurations required. Chances are, you already own all the equipment you need to start taking advantage of the Returns Module.

MANAGEMENT REPORTS

SalesTax provides an array of valuable management reports to help you see where you've been . . . and where you're going.

Sales Tax Register

Using data stored by the Calculation Module, SalesTax can produce detail and summary Sales Tax Register reports – sequenced by state, county, and city – for any billing period.

At each geographic level, totals for taxes, taxable sales, and exempt sales are automatically provided and broken into the appropriate state, county, and city taxes due, allowing transfer to the Returns Module. Rapid transit taxes are distinguished and reported separately from county and city taxes.

A recap report will be automatically generated with either register format, containing state recaps and grand totals.

Gross Receipts Report

This report provides helpful information on gross receipts distribution, including a "ship-to" summary and a state-level "ship from/ship to" breakdown.

History Report

SalesTax will also retrospectively summarize Tax Register or Gross Receipts information by week, month, YTD, or annually.

GEOCODE™ – THE BETTER LOCATION CODE

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[redacted],

Petitioner,

[redacted] STATE OF NORTH DAKOTA,
[redacted] Tax Commissioner,
[redacted],

Respondent.

On Writ of Certiorari to the
[redacted] Court of the State of North Dakota

AMICUS CURIAE BRIEF OF THE
STATE OF NEW YORK IN SUPPORT
OF RESPONDENT

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No. 91-194

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

QUILL CORPORATION,

Petitioner,

v.

STATE OF NORTH DAKOTA,
by and through its Tax Commissioner,
HEIDI HEITKAMP,

Respondent.

On Writ of Certiorari to the
Supreme Court of the State of North Dakota

Interest of the Amicus Curiae

Pursuant to Rule 37.5, the City of New York, as a political subdivision of the State of New York, is exercising the right to file a brief amicus curiae in support of the position of the State of North Dakota.

The City's interest in the case arises from the fact that similar questions of tax liability arise under a sales/use tax law imposed for its benefit and will later arise when its own presently suspended sales/use tax becomes effective again.

The State of New York has a sales/use tax of 4%. N.Y. Tax Law, Article 28. An essentially identical tax was imposed by New York City pursuant to the authority given by N.Y. Tax Law, Article 29. During the City's fiscal crisis in the mid-70's, the authority of the City to impose the tax was suspended until various bonds issued to help the City were repaid. Instead, the State itself imposed a sales/use tax of 4%, similar to its own such tax, for the benefit of the City. Tax Law §1107. Later an additional tax of the same nature was imposed at the rate of one-quarter of one percent within the territorial limits of the Metropolitan Commuter Transportation District

(which includes all of New York City) with the resulting revenue to be transferred to the Mass Transportation Operating Assistance Fund. N.Y. Tax Law §1109.

In 1989 the State enacted a law designed to make sure that its use tax would be applied to a person who regularly or systematically solicits business in New York by distribution, regardless of the location from which the distribution originated, of catalogs, advertising flyers, letters or the like and who, as a result, makes sales within the State of personal property, such tax liability to apply to the extent that the nexus requirement of the United States Constitution is satisfied. New York Laws 1989, ch. 81, §246, amending Tax Law §1101, subd. b, par. 8(i)(E). This new provision is equally applicable to the tax the State imposes for New York City. N.Y. Tax Law §1107(a). When the suspension of the original City imposed sales/use tax terminates, the tax then

reinstated will also be subject to the 1989 New York law passed with regard to mail order sales.

It has been estimated by the New York State Commissioner of Taxation and Finance that the State and its local governments are losing $200 million a year because of the failure of mail order businesses to collect or pay sales or use taxes. New York Newsday, June 19, 1991, p.28. Since the City's sales tax is almost equal to that of the State, it would appear that the City's loss is close to $100 million.

It is clear then that a decision in this case will have an impact on tax revenues of New York City.

ARGUMENT

A MAIL ORDER VENDOR MAY BE REQUIRED TO COLLECT A USE TAX IN A STATE WHERE IT HAS NO OFFICE OR REPRESENTATIVES SO LONG AS IT HAS AN ADEQUATE NEXUS TO THAT STATE. UNDER THESE CIRCUMSTANCES NEITHER THE COMMERCE NOR THE DUE PROCESS CLAUSES ARE VIOLATED.

a. Changes in the method of interpretation of commerce clause.

For many years the commerce clause was applied to State taxation in a rigidly formalistic manner. In essence, the rule was that a state tax on any activity or process of interstate commerce was invalid as a "regulation of interstate commerce." An early example is Case of the State Freight Tax, 15 Wall. (82 U.S.) 232 (1872). Later, license taxes on "drummers" were invalidated when they merely came into a State to solicit sales for an employer in another State. Robbins v. Shelby Taxing District, 120 U.S. 489 (1887); Asher v. Texas, 128 U.S. 129 (1888); Brennan v. Titusville, 153 U.S. 289, 306 (1894). An analogous license tax was set

aside in McCall v. California, 136 U.S. 104, 114 (1890). In Leloup v. Port of Mobile, 127 U.S. 640, 648 (1888), the Court, in the course of denying validity to a licence tax on a telegraph company, succinctly restated the rigid rule and indicated a variety of taxes which would be nullified under it.

Crew Levick Co. v. Pennsylvania, 245 U.S. 292 (1917), made it clear that the rule would apply to a gross receipts tax. Similarly, it was held that a tax based on two factors, the proportion of the total value of capital shares attributed to transactions in the taxing state and the proportion of net income from such transactions, must be set aside. Alpha Cement Co. v. Massachusetts, 268 U.S. 203, 218 (1925).

Indications that the rigid rule was being modified, at least to the extent to which other considerations were taken into account in deciding the impact of the commerce clause on

State taxation, can be seen in two cases which upheld use taxes imposed on a vendee located in the taxing State. Henneford v. Silas Mason Co., 300 U.S. 577, 581, 587-588 (1937); Southern Pac. Co. v. Gallagher, 306 U.S. 167, 177-178 (1939).

Felt & Tarrant Co. v. Gallagher, 306 U.S. 62 (1939), upheld a provision in a use tax law which required the vendor to collect the tax. There the vendor's sole connection to the taxing State was the use of two general agents to solicit orders for it and the providing of offices for each of these agents with the lease designating the vendor as the lessee.

In McGoldrick v. Berwind-White Co., 309 U.S. 33 (1940), the Court appeared to be adopting a more realistic approach to the problem. It upheld a sales tax which required the seller to collect the tax from the buyer despite the fact that it produced the coal sold in another State. Its activities in the taxing

State consisted of delivering the coal there, maintaining a sales office for its salesmen and entering into its sales contract with the local customers.

The approach of the Court to the commerce clause issue was different from the old rigid rule. At the outset it said (309 U.S. at pp. 45-47):

> "Forms of state taxation whose tendency is to prohibit the commerce or place it at a disadvantage as compared or in competition with intrastate commerce, and any state tax which discriminates against the commerce, are familiar examples of the exercise of state taxing power in an unconstitutional manner, because of its obvious regulatory effect upon commerce between the states.
>
> But it was not the purpose of the commerce clause to relieve those engaged in interstate commerce of their just share of state tax burdens, merely because an incidental or consequential effect of the tax is an increase in the cost of doing the business, Western Live Stock v. Bureau, 303 U.S. 250, 254. Not all

---

* Foot Note omitted.

> state taxation is to be condemned because, in some manner, it has an effect upon commerce between the states, and there are many forms of tax whose burdens, when distributed through the play of economic forces, affect interstate commerce, which nevertheless fall short of the regulation of the commerce which the Constitution leaves to Congress. A tax may be levied on net income wholly derived from interstate commerce. Non-discriminatory taxation of the instrumentalities of interstate commerce is not prohibited.

See, also, 306 U.S. at pp. 48, 50-51, 54-57.

Nelson v. Sears, Roebuck & Co., 312 U.S. 359 (1941), sustained a use tax requirement that the seller collect the tax on mail order sales although the orders were sent to the vendor outside the taxing State and were filled by direct shipments through the mail or by common carrier. This was based on the presence in the taxing state of retail stores owned by the seller even though those stores did not participate in the mail order sales. To the same effect: Nelson v. Montgomery Ward, 312 U.S. 373 (1941); Pacific Tel. Co. v

Gallagher, 306 U.S. 182 (1939). Similar realistic approaches formed the basis for sustaining a gross receipts tax in Harvester Co. v. Dept. of Treasury, 322 U.S. 340 (1944).

Under the old rigid approach, the tax involved in General Trading Co. v. Tax Commn., 322 U.S. 335 (1944), would undoubtedly have been stricken as a regulation of interstate commerce. There, a Minnesota corporation, not qualified to do business in Iowa, used traveling salesmen to solicit orders in Iowa, and the goods sold were delivered from Minnesota by common carrier or mail after acceptance of the order in Minnesota. The seller had no retail stores or sales office in Iowa. Yet it was held appropriate to compel it to collect the use tax from its customers. The reasoning on which this result was reached was succinctly stated by Justice Frankfurter (322 U.S. at p. 338):

"Of course, no State can tax the privilege of doing interstate business. See Western Live Stock v. Bureau, 303 U.S. 250. That is within the protection of the Commerce Clause and subject to the power of Congress. On the other hand, the mere fact that property is used for interstate commerce or has come into an owner's possession as a result of interstate commerce does not diminish the protection which he may draw from a State to the upkeep of which he may be asked to bear his fair share. But a fair share precludes legislation obviously hostile or practically discriminatory toward interstate commerce. See Best & Co. v. Maxwell, 311 U.S.454.
None of these infirmities affects the tax in this case any more than it did in the other cases with which it forms a group. The tax is what it professes to be--a non-discriminatory excise laid on all personal property consumed in Iowa. The property is enjoyed by an Iowa resident partly because the opportunity is given by Iowa to enjoy property no matter whence acquired. The exaction is made against the ultimate consumer--the Iowa resident who is paying taxes to sustain his own state government. To make the distributor the tax collector for the State is familiar and sanctioned device."

Nevertheless, taxes were held unconstitutional, in cases which purported to apply the new approach, despite the narrowest

of differences between those cases and the cases upholding taxes. In McLeod v. Dilworth Co., 322 U.S. 327 (1944), with facts essentially identical with General Trading Co., the tax was set aside because it was a sales tax, not a use tax as in the other case.

A license tax on a vendor based solely on its solicitation in the taxing jurisdiction was invalidated because, with regard to sellers from other states, it was likely to be discriminatory and because the amount of tax had no relation to the volume of business transacted. Nippert v. Richmond, 327 U.S. 416 (1946).

Soon thereafter a tax was stricken on reasoning which was not too different from that applied under the former rigid approach. Freeman v. Hewitt, 329 U.S. 249 (1946).

In Miller Bros. Co. v. Maryland, 347 U.S. 340 (1954), it was held that a Delaware corporation selling merchandise in its store in that State could not be required to collect a

Maryland use tax when it used its own trucks to deliver the articles purchased to Maryland customers. Here again there are references to the new approach, but the reasoning is reminiscent of the original view of the impact of the commerce clause on State taxation.

The vendor, however, was compelled to collect a use tax even though it had no office or place of business in the taxing state and had no property or full time employees there so long as it had wholesalers or jobbers in that State soliciting sales for it. Scripto v. Carson, 362 U.S. 207 (1960).

In many of the more recent cases earlier decisions were, in effect, overruled or the reasoning on which they were decided were cast aside and replaced with a more realistic approach. In at least two cases, the Court specifically overruled earlier cases. Spector Motor Service v. O'Connor, 340 U.S. 602 (1951), was overruled by Complete Auto Transit

v. Brady, 430 U.S. 274, 288-289 (1977). [See Washington Rev. Dept. v. Stevedoring Assn., 435 U.S. 731, 740 f.n. 11 (1978).] Puget Sound Stevedoring Co. v. State Tax Comm'n, 302 U.S. 90 (1937), and Joseph v. Carter & Weekes Stevedoring Co., 330 U.S. 422 (1947), were overruled by Washington Rev. Dept. v Stevedoring Assn., supra, 435 U.S. at 750.

b. National Bellas Hess

(1)

National Bellas Hess v. Department of Revenue, 386 U.S. 753 (1967), involved an attempt by Illinois to collect use taxes from a Missouri mail order vendor which had no tangible property in Illinois, had no sales outlets, representatives, telephone listing or solicitors in that State and did not advertise there by radio, television, billboards or newspapers. The seller mailed catalogs twice a year to its customers in all States, including Illinois, supplemented by occasional "flyers."

Orders were mailed to the vendor's Missouri plant, and the goods purchased were delivered by mail or common carrier. The Court held that the commerce clause prohibited Illinois from requiring the vendor to collect the use tax.

The majority opinion first pointed out that in the area involved a challenge under the commerce clause or one under the due process clause are "closely related" (p. 756). To escape the bar of the due process clause, it must be shown that the State has given something for which it can ask a return, and the "same principles have been held to apply to collecting use tax when challenged under the commerce clause" (p. 756). There must be a minimum connection between the State and the person, property or transaction it seeks to tax.

The Court then referred to several of its cases which had upheld use tax provisions requiring an interstate seller to collect use taxes. It said, however, that it had never

held that a State may require collection of a use tax where the seller's only connection with its customers in the State is by common carrier or by mail, relying on statements made in two cases in which the application of the use tax had been upheld. It concluded that it is difficult to conceive of commercial transactions more exclusively interstate in character than the mail order transactions there involved; and that, if the power of Illinois to impose the use tax burdens were upheld, the impediments upon the free conduct of interstate business would be neither imaginary nor remote. It supported this view by referring to the burdens which would be cast since, if the Illinois action were sustained, every State and every municipality or political subdivision with the power to impose sales and use taxes could apply similar requirements despite the variations in the rates of tax, in allowable exemptions and in administrative and record-keeping requirements.

This, it said, would entangle the vendor in a "virtual welter of complicated obligations to local jurisdictions with no legitimate claim to seek a fair share of the cost of local government" (pp. 759-760).

Although grounds for distinction between the Bellas Hess case and the present one may be drawn, we respectfully submit that Bellas Hess should be overruled. It should be noted that we are dealing in an area of law in which this Court has indirectly or specifically overruled earlier determinations.

The attitudes of scholars obviously are not determinative of action by this Court, but certainly their views may be considered. A substantial number of academicians and legal writers in the area of law here involved have either decided that Bellas Hess was wrongly decided or that subsequent developments call for its being overruled or have criticized its reasoning. Some examples of these views are:

Hartman, Collection of the Use Tax on Out-of-State Mail-Order Sales, 39 Vand. L. Rev. 993, 1003-1015 (1986); Lockhart, A Revolution in State Taxation of Commerce, 65 Minn. L. Rev. 1025, 1050-1052 (1981); Simes, The Concept of "Nexus" and State Use and Unapportioned Gross Receipts Taxes, 73 Nw. U.L. Rev. 112, 132-133 (1978).

(2)

Before analyzing the Bellas Hess case, we will refer briefly to subsequent cases which indicate that the Court is moving toward a more realistic and reasonable approach to the impact of the commerce clause on State taxation. That clause is no longer being used as a sword to destroy State taxes, but as a shield to protect interstate commerce from being disproportionately taxed.

Complete Auto Transit, Inc. v. Brady, supra, 430 U.S. 274, sustained a gross receipts tax for the privilege of doing business on

payments made to a motor carrier of cars manufactured in another State which were delivered in such a manner as to make what it did an interstate activity. This case, as previously noted, overruled the earlier Spector decision. The Court emphasized that the mere act of carrying on a business in interstate commerce does not create an exemption from State taxation and that the commerce clause was not designed to relieve those engaged in interstate commerce from their fair share of a State's tax burden (pp. 288-289). Earlier in the opinion the Court described a four prongs test that had been used in determining whether a tax on interstate commerce was permissible. It said that these decisions (p. 279)

> "have sustained a tax against Commerce Clause challenge when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State."

See, also, page 287.

National Geographic v. Cal. Equalization Bd., 430 U.S. 551 (1977), upheld a requirement that a mail order business selling property in interstate commerce collect a use tax in the State of delivery. The vendor also published a magazine, and it had two offices in California used to solicit advertising for the magazine. Although these offices had no relation to the mail order business, it was held that they formed sufficient nexus to make the California use tax applicable. The Bellas Hess case was distinguished on the ground that there the seller's only connection with the taxing State was by common carrier or by mail (p. 559).

Washington Rev. Dept. v. Stevedoring Assn., supra, 435 U.S. 734, also overruled two earlier decisions. It held that a gross receipts tax could be applied to the gross income of the interstate commerce activity of a stevedoring company. Relying on the Complete Auto case, it concluded that a State tax may be

imposed on one engaged solely in interstate commerce (pp. 745-747). It noted that interstate commerce must bear its fair share of the State tax burden. It said that the Court repeatedly had sustained "taxes that are applied to activity with a substantial nexus with the State, that are fairly apportioned, that do not discriminate against interstate commerce, and that are fairly related to the services provided by the State" (p. 750).

In D. H. Holmes Co. v. McMamara, 486 U.S. 24 (1988), a Louisiana use tax was held properly applicable to catalogs shipped into the State and delivered to residents therein when the company arranging for these shipments owned 13 department stores in Louisiana. This case is merely a slight variation on prior cases since the company which was taxed owned stores in the taxing state. Statements made by Chief Justice Rehnquist point out that the tax was fairly related to benefits provided by the

State because the services provided by Louisiana included police and fire protection for the stores and the running of mass transit and the maintenance of public roads which benefits the customers (p. 32). In concluding that the distribution of the catalogs reflects a substantial nexus with Louisiana, reference was not only made to the department stores in the State, but to the fact that the catalogs were designed to improve sales among the residents enhancing the Louisiana business (pp. 32-33). The Bellas Hess case was distinguished on the ground that here the taxpayer had more economic presence in the taxing State and received more direct benefits from it (p. 33).

Goldberg v. Sweet, 488 U.S. 252 (1989), involved an Illinois 5% tax on the gross charge for interstate telephone communications originating or terminating in that State and charged to an Illinois service address, regardless of where the telephone call is billed

or paid. An identical tax was imposed on intrastate telecommunications. A credit was given to a taxpayer to the extent that a tax had been paid in another State for a telephone call subjected to the Illinois tax.

At the outset of the opinion the Court briefly outlined the "massive technological" changes which had occurred recently in the telecommunications industry. The tax, challenged on commerce clause grounds, was found valid after testing it pursuant to the four-pronged test applied in the Complete Auto case. An argument that the tax was not fairly apportioned, based on the second prong of that test, was rejected because, if every State were to impose a similar tax, only one State would tax each interstate telephone call. Similarly a contention that a tax on an interstate activity must be apportioned to cover only the in-state activity was denied on the ground that sales or use taxes had been upheld under analogous

circumstances and because the tax law reflects the way in which consumers purchase telephone calls.

A third prong argument, that the tax discriminated against interstate commerce, was quickly disposed of by showing that the tax was on a resident of the State imposing it and that it would be impossible to measure the activities within the State because the exact paths of electronic signals could neither be traced or recorded.

Applying the fourth prong, that the tax is fairly related to the services provided by the taxing State, the Court refused to confine the services provided to telecommunication equipment, holding that interstate commerce "'may be required to contribute to the cost of providing all governmental services, including services from which it arguably receives no direct "benefit."'" It said that providing police

and fire protection and other general services sufficed to meet the fourth prong.

In a brief concurring opinion Justice Scalia said that he remained of the view that only taxes that facially discriminate against interstate commerce violate the negative commerce clause. He cited his concurring and dissenting opinion (joined by Chief Justice Rehnquist) in Tyler Pipe Industries v. Dept. of Revenue, 483 U.S. 232, 254 et seq. (1987).

In Amerada Hess Corp. v. N.J. Taxation Div., 490 U.S. 66 (1989), an attempt was made to set aside New Jersey's Corporation Business Tax. That tax provided for the usual three-factor formula for income earned in interstate commerce, but the ground for attack, under the commerce, due process and equal protection clauses, was that no deduction from income was made for payments to the federal government for its Windfall Profit Tax.

The Court found that the failure to provide such a deduction did not violate any of the four-prongs test stated in Complete Auto. In the course of showing this, it stated that the tax is fairly related to benefits New Jersey provides, including police and fire protection and the advantages of a civilized society (p. 79). The Court decided, in addition to rejecting the equal protection argument, that satisfying the four-prongs of the test sufficed to show that due process was not violated (p. 80).

Justice Scalia concurred on the ground that, since the tax does not facially discriminate against interstate commerce, this suffices to deny a claim that a State tax violates the commerce clause. He added that, to the extent that the Complete Auto analysis pertains to the due process requirement, the requirment had been met (pp. 80-81).

Trinova Corp. v. Michigan Dept. of Treasury, __U.S.__, 111 Sup. Ct. 818 (1991), sought to set aside a value added tax on the ground that its apportionment formula was not a fair one and that the tax discriminated against interstate commerce. Both of these contentions were rejected. In doing this the Court again relied on the four-prongs test of the Complete Auto case and it emphasized that, in dealing with the impact of the commerce clause on State taxation, formalism should be avoided and reliance should be had on a "'consistent and rational method of inquiry [focusing on] the practical effect of a challenged tax'" (pp. 828-829). In his concurring opinion Justice Scalia reiterated his view that, if the tax is not facially discriminatory, it meets the requirements of the commerce clause.

(3)

The cases since the Bellas Hess decision show a complete rejection of the earlier

formalistic approach to commerce clause challenges to State taxation and an emphasis on the practical effect of any such tax. The test used is the four-part one of Complete Auto. And, perhaps more important, is the flexible manner in which it has been applied. Since the time that Bellas Hess was decided in 1967 and the present there have been changes in circumstances which warrant consideration. The amount of sales made by mail order businesses has skyrocketed and their failure to collect sales or use taxes from their customers has caused substantial losses in tax revenues to the States imposing such taxes. In addition, there has been an explosion in the methods of using computer and similar devices, and a sharp reduction in the cost of such equipment.

Bellas Hess did not deal with prongs two and three of the Complete Auto test, the need for fair apportionment and a lack of discrimination against interstate commerce.

That a use tax meets these two prongs was well established by earlier cases upholding use taxes. See, for examples, Felt & Tarrant Co. v. Gallagher, supra, 306 U.S. 62; McGoldrick v. Berwind-White Co., supra, 309 U.S. 33; General Trading Co. v. Tax Commn., supra, 322 U.S. 335. See, also, the later case of D.H. Holmes v. McNamara, supra, 486 U.S. 24.

Bellas Hess, in effect, applied the first and fourth prongs of the test as grounds for declaring the tax unconstitutional. It found that there was not sufficient nexus, based on the view that the taxpayer's only connection with the taxing State was by common carrier or by mail. It also found that the taxing State had not given the taxpayer anything for which it could ask a return as a fair share of the cost of local government.

Even if we assume that these conclusions were sound with regard to the Bellas Hess company at the time they were reached in 1967,

there are strong reasons for concluding that different conclusions should be reached today with regard to the petitioner in the present case.

Since the first and the fourth prongs of Complete Auto, nexus and a tax fairly related to the services provided, are in many ways intertwined, we shall deal with both together. Petitioner's nexus to North Dakota is not limited to the delivery of its goods by common carrier or by mail. This conclusion in Bellas Hess rested on the theory that there could be no nexus unless the vendor owned or leased property in the taxing State or had agents there. This approach became so rigid a basis for tax viability that property or agents in the state sufficed even though the property or agents had nothing to do with the sales of the property on which the tax was based. Justice Frankfurter warned against such a practice in

Wisconsin v. J.C. Penney Co., 311 U.S. 435 (1940), when he said (p. 445):

> "Nothing can be less helpful than for courts to go beyond the extremely limited restrictions that the Constitution places upon the states and to inject themselves in a merely negative way into the delicate processes of fiscal policy-making. We must be on guard against imprisoning the taxing power of the states within formulas that are not compelled by the Constitution but merely represent judicial generalizations exceeding the concrete circumstances which they profess to summarize."

Even without a physical nexus, there is no justification for treating a State which provides a substantial market for your products as a result of your soliciting of sales by forwarding catalogs by mail to potential customers as having no right to tax solely because the seller has no physical presence in the taxing State. Certainly local competing vendors are well aware of the sales they lose to mail order houses located outside the State. With the burgeoning market for mail order products and the

resulting loss of sales/use taxes, the physical presence doctrine should be reconsidered.

In this case as in many, if not most, mail order sales, the sales are sales on approval as provided in the Uniform Commercial Code §2-326*. Such a sale keeps the title in the vendors until the goods are accepted. Uniform Commercial Code §2-327. The first of these sections provides that a "sale on approval" occurs when the goods are delivered primarily for use and when the goods may be returned by the buyer even though they conform to the contract. This was true of Quill's.

Thus the Quill Corporation had title to its products until the buyer accepted them.

---

* Petitioner denies this and, as a result, the North Dakota Supreme Court thought it unnecessary to pass on the issue. But the facts make it so clear that the section applies and that the sales are so clearly sales on approval that this Court should so decide. If not, the case should go back to the State Court for a decision on this issue.

During the period of delivery in North Dakota and until the buyer accepted the delivered goods the police and fire protection of North Dakota was available for property which was still owned by the seller, the Quill Corporation. [It is not clear whether the title remained in the Bellas Hess company when its goods were delivered in Illinois.]

North Dakota also has the need to dispose of Quill's catalogs when they are discarded as waste. It is no adequate answer to say that the catalogs are the waste of the potential customers. This might be true where each catalog was specifically requested, but generally catalogs are sent to potential customers even though they have not requested them. In such instances there can be no doubt that the out-of-state vendor created the waste to be disposed of by the taxing State.

North Dakota's courts are available to assist petitioner to collect unpaid obligations

owed by its customers in that State. In an affidavit in support of a motion for summary judgment the petitioner stated that invoices for merchandise shipped to customers were mailed "usually within one day of the shipment" (JA30). Since the merchandise was shipped before bills were sent, there is a real possibility that some of these bills will not be paid even though the shipped goods are not returned. It may be that Quill has not thus far used the North Dakota courts, but any time a bill is not paid there will, with rare exception, be a need to use those courts to collect it.

The great difficulties foreseen in Bellas Hess with regard to use taxes imposed by numerous jurisdictions with varying tax rates has largely disappeared with the great advances in the use of computers. Software can be prepared, and may already be available, to deal readily with such problems. In any event,

such problems, as well as administrative and the record-keeping requirements, were necessarily involved with respect to the various use taxes upheld in the cases which sustained the tax because of physical presence in the taxing State.

It should not be forgotten that the requirements of a use tax on an out-of-State vendor are far less than a tax imposed directly on such a vendor. All that he is required to do under a use tax is to collect the tax from a customer who lives in the taxing State and who is obliged to pay it.

(4)

In Bellas Hess it was pointed out that the issue of due process as applied to a tax on deliveries across State lines is essentially the same as the issue arising under the commerce clause. Other cases hold that, if the four-prong test of Complete Auto is met, due process is satisfied. Accordingly, we rely on

our argument concerning the commerce clause as adequate to meet the due process attack.

c. Federal legislation

Petitioner insists that, if the physical presence test for nexus is to be abandoned, it should be done by an act of Congress. While Congress undoubtedly may act in this area, this Court has both stricken and upheld laws challenged as violating the commerce clause, and it has changed its views so as to uphold certain types of laws which in earlier years it had invalidated. The fact that legislation in this field has been introduced in Congress does not mean that this Court cannot act on the matter. Certainly the failure of Congress to enact the proposed legislation does not indicate that Congress is opposed to the proposals contained in it. The failure of Congress or any other legislature to enact proposed legislation may rest on a wide variety of grounds. See

Flanagan v. Mt. Eden Gen. Hosp., 24 N.Y.2d 427, 432-434 (1969).

In the City of New York's amicus brief in Wisconsin Department of Revenue v. Wrigley (No. 91-119), we dealt with Public Law 86-272 which, to some extent, limits the situation in which an income tax may be imposed on revenues coming from interstate commerce. That legislation was the result of a report by a subcommittee of the House Judiciary Committee. (Volume 4, House Report No. 952, 89th Congress, First Session, entitled State Taxation of Interstate Commerce.) The Report recommended limitations on the right to tax with respect to income tax, sales or use taxes and gross receipts tax. Congress adopted, with some modification, the income tax recommendation, but did not adopt any legislation with regard to sales or use taxes or gross receipts taxes. This does not conclusively show the Congressional attitude,

but it does show that with respect to these taxes it was willing to leave the matter to this Court.

CONCLUSION

THE JUDGMENT BELOW SHOULD BE AFFIRMED.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1991

QUILL CORP.
PETITIONER

v.

NORTH DAKOTA
RESPONDENT

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NORTH DAKOTA

BRIEF OF AMICUS CURIAE, TAX POLICY RESEARCH PROJECT IN SUPPORT OF RESPONDENT

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NORTH DAKOTA
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BRIEF OF AMICUS CURIAE, TAX POLICY RESEARCH PROJECT IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICUS CURIAE*

The Tax Policy Research Project is a consortium of faculty researchers at the Bloch School of Business and Public Administration, University of Missouri--Kansas City. The Tax Policy Research Project seeks to improve public awareness about the role tax policy plays in legal, political and social decisions.

In *Quill Corp. v. North Dakota*, the Tax Policy Research Project is interested in seeing the Court apply its modern interstate taxation analysis to direct mail marketing transactions. The current tax treatment for these transactions, which stems from the Court's 1967 decision in *National Bellas Hess v. Department of Revenue*, does not conform to the analysis applied to other interstate transactions today nor to the realities of modern commercial practice. The Tax Policy Research Project believes direct mail sellers' present exemption from tax collection no longer is supported by the law or the facts.

SUMMARY OF ARGUMENT

In 1977, the Court established its current analysis for interstate taxation issues, which departed from earlier, varied approaches such as that espoused in *National Bellas Hess*. As a result, modern commerce clause and due process analyses for constitutional interstate taxation do not apply to Petitioner when it seeks to avoid collecting an otherwise constitutional tax. Petitioner's only legitimate due process protections are articulated in personal jurisdiction cases, which support North Dakota's ability to pursue Petitioner for use tax remittance.

ARGUMENT

I. Interstate taxation law no longer justifies Petitioner's challenge to North Dakota's use tax collection requirement.

The North Dakota Supreme Court explained that the consumer ultimately was responsible to pay the use tax in

question in this case. *State v. Quill Corp.*, 470 N.W. 2d 203, 205 (N.D. 1991). Retailers like Petitioner only are required to collect the tax and remit it to the state. Section 57-40.2-07, N.D.C.C. Under modern interstate taxation cases, such a tax is constitutionally permissible. Further, these cases provide no basis for retailers to challenge their collection obligation under these permissible tax schemes.

In *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977), this Court held that a state tax on interstate commerce was constitutional if the state had sufficient contacts with the activity taxed and if the state conferred sufficient benefits on the taxpayer to justify the tax. Here, the activity taxed is storage, use or consumption within North Dakota. 57-40.2-01, N.D.C.C. The taxpayer is the North Dakota consumer to whom Petitioner delivers goods for use in the state. Such a use tax scheme satisfies the constitutional benefits and nexus requirements articulated in *Complete Auto Transit*.

The relationship of North Dakota here to the taxpayer and the tax collecting agent is analogous to those relations in *Goldberg v. Sweet*, 488 U.S. 252 (1989). In *Goldberg*, Illinois telephone customers paid the telecommunications tax on long distance calls to or from an in-state phone, that were billed to in-state addresses. Long distance service providers, such as MCI and Sprint, were required to collect the tax and remit it to the state. This Court upheld the tax based on *Complete Auto Transit*. 488 U.S. at 259.

In *Goldberg*, this Court had "little difficulty concluding that the Tax Act is fairly related to the benefits received by Illinois telephone consumers." 488 U.S. at 267. Further, Illinois proved sufficient nexus with the activity taxed: long distance calling to and from the state, when the call is charged to an in-state service address. 488 U.S. at 263. Despite a challenge by long-distance service providers who were required to collect the tax, *Goldberg* did not require the state to show nexus or benefits or any other due process protections vis-a-vis the long distance service providers, to support their collection obligation. Today, North Dakota's use taxation and collection scheme mirrors the Illinois telecommunication tax upheld in *Goldberg*: "The tax at issue has many characteristics of a sales tax. It is

assessed on an individual consumer, collected by the retailer, and accompanies the retail purchase . . . ." 488 U.S. at 262.[1]

In *Complete Auto Transit* and *Goldberg*, the Court focused its benefits and nexus analyses solely on the taxpayer and the activity taxed. Nevertheless, Petitioner continues to insist that North Dakota must confer benefits upon and maintain contacts with out-of-state tax collecting retailers such as Petitioner.[2] Petitioner relies on *National Bellas Hess v. Department of Revenue*, 386 U.S. 753 (1967), which held that a state lacks the power to require tax collection when a seller does "no more than communicate with customers in the State by mail or common carrier as part of a general interstate business." *Id.* at 758.

Petitioner's continued reliance on this 1967 precedent ignores the Court's deliberate departure from its earlier interstate taxation analyses when it articulated the revised nexus and benefits requirements in *Complete Auto Transit*. This Court has described pre-*Complete Auto Transit* cases, such as *National Bellas Hess*, as creating a "wavering doctrinal line," of authority regarding interstate taxation. See, *Goldberg*, 488 U.S. at 259. Yet, Petitioner urges the Court to return to this "wavering" line of reasoning when it presses for continued application of the *National Bellas Hess* constitutional analysis.[3]

[1] Petitioner argues that Congress is the appropriate body to establish any tax collection burden in these interstate transactions. Petitioner's Brief at 47. This Court's decision in *Goldberg* that upheld a comparable state tax, including the collection obligation, seriously undermines that conclusion.

[2] Petitioner does not assert that the tax is uncollectible from North Dakota consumers, thus transforming Petitioner into the party liable to pay the tax. Rather, Petitioner simply blurs the distinction between tax payment liability and the tax collection requirement. Petitioner's Brief at 29-31. Petitioner's approach defies the Court's realistic distinction between the obligations of the taxpayer and the tax collecting agents in *Goldberg*, 488 U.S. at 262.

[3] Admittedly, this Court favorably cited *National Bellas Hess* in *Goldberg*. 488 U.S. at 263. However, *National Bellas Hess* is cited for its guidance on the proportionality requirement of *Complete Auto Transit*, not on the nexus and benefit elements. In citing *National Bellas Hess*, the *Goldberg* Court said not every phone call received in the state could be taxed by Illinois. 488 U.S. at 263. However, Illinois only taxed the calls that also were charged to an in-state address, which was both internally and externally consistent. 488 U.S. at 265. Petitioner does not challenge the North Dakota use tax on these grounds.

Based on *Complete Auto Transit*, a use tax scheme in which North Dakota consumers pay North Dakota for use of goods in the state is constitutional. Earlier interstate tax cases, such as *National Bellas Hess*, with their varied approaches to the commerce clause and to due process, have been replaced with an interstate taxation analysis that does not support a retailer's attempt to avoid tax collection and remittance under an otherwise legitimate tax law.

II. Modern personal jurisdiction cases explain Petitioner's due process protections.

The only nexus requirement that North Dakota must satisfy regarding Petitioner is the due process "minimum contacts" standard for personal jurisdiction when the state sues Petitioner for failing to remit applicable use tax liability. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). North Dakota can satisfy that due process requirement regarding Petitioner and, presumably, many other mail-order vendors.[4]

This Court has held that physical presence is unnecessary for a court to exercise personal jurisdiction over an out-of-territory defendant. *McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957). Contemporary jurisdiction cases recognize that commercial activity purposefully directed to a state, without any physical presence, will satisfy due process minimum contacts requirements. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985).

The North Dakota Supreme Court articulated the extent of Petitioner's purposeful sales activity directed at North Dakota and its consumers: annually, Petitioner mailed more than 230,000 separate pieces of mail (24 tons) into the state. As a result, Petitioner received over 200,000 orders from 3500 active North Dakota customers, valued at $1,000,000.

[4] Historical distinctions between the due process analyses for personal jurisdiction, tax collection and tax payment have disappeared as the Court honed its interstate tax analysis and focused that analysis on the taxpayer. *See* McCray, *Overturning Bellas Hess: Due Process Considerations*, 1985 *B.Y.U.L. Rev.* 265 (1985). Petitioner's only support for continued distinct due process standards for personal jurisdiction and tax collection are *National Bellas Hess* and a case that pre-dates *National Bellas Hess*. Petitioner's Brief at 33.

470 N.W. 2d at 204-05. The state's pursuit of such an active solicitor for use tax remittance hardly offends traditional notions of fair play and substantial justice.[5]

CONCLUSION

Obviously, affirming the North Dakota result will render *National Bellas Hess* the same as many other pre-*Complete Auto Transit* cases: a piece of constitutional history. But, when the facts that supported *National Bellas Hess* have dramatically changed, then the law those facts spawned must yield. See *e.g. Burger King*, 471 U.S. at 476. ("It is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines,... .")

Upholding the state tax collection requirement on mail-order retailers will confirm that modern constitutional law must not defy modern life, in which mail buying and selling is a common occurrence. *Complete Auto Transit* overruled the long-standing *Spector*[6] rule of interstate taxation because it had been completely "stripped of any practical significance." 430 U.S. at 288. Now, the same can be said of *National Bellas Hess* and the Court should respond accordingly.

Respectfully submitted,

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[5] Nothing in the North Dakota opinion indicates that Petitioner ever objected to the North Dakota courts' jurisdiction over it.

[6] *See Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602 (1951).

EXHIBIT ONE

Permission to File Brief of Amicus Curiae

Pursuant to Supreme Court Rule 37.03, Quill Corp., Petitioner in Quill Corp. v. North Dakota, consents to the filing of an amicus curiae brief by the Tax Policy Research Project, University of Missouri--Kansas City.

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EXHIBIT TWO

Permission to File Brief of Amicus Curiae

Pursuant to Supreme Court Rule 37.03, the State of North Dakota, Respondent in Quill Corp. v. North Dakota, consents to the filing of an amicus curiae brief by the Tax Policy Research Project, University of Missouri--Kansas City.

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